# Ontario-Québec electricity collaboration and interprovincial trade barriers: using the Agreement on Internal Trade to promote a more sustainable electricity sector in Canada

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# Abstract

The purpose of this major paper is to examine the potential for the Agreement on Internal Trade ("AIT") to facilitate electricity trade between the provinces of Ontario and Québec. The AIT covers a wide range of topics, but its chapter on energy was never completed. The principle objective of this paper is to identify current interprovincial trade barriers in the electricity sector and determine whether the addition of an energy chapter to the AIT would be a viable method of minimizing those barriers.

In recent months, importing electricity from Québec has been increasingly recognized as an alternative to building electricity production infrastructure in Ontario. Two recent workshops in Toronto and Montréal identified a number of potential benefits that could be achieved through greater electricity collaboration between the two provinces. These include technical benefits such as greater flexibility and the balancing of intermittent renewable energy resources; economic benefits from a price somewhere between what Québec currently receives for its electricity exports to the Northeastern United States and the price that Ontario is planning to pay for its nuclear refurbishments; and the political opportunity to act cooperatively in demonstrating leadership on the issue of climate change.

After briefly going over the potential benefits of interprovincial electricity trade between Ontario and Québec, this paper introduces the general concept of internal trade barriers. It then gives an overview of the federal and provincial regulators involved in electricity planning in Canada, Québec and Ontario, before delving into the technical, political, cultural and regulatory barriers present in Canada's electricity sector.

The paper then gives an introduction to the history, development and structure of the AIT before discussing how the AIT energy chapter would relate to recent initiatives to increase Ontario-Québec electricity cooperation. Finally, it offers suggestions for inclusions that could be made to the AIT energy chapter in order to address the internal trade barriers previously identified.

The results of my research indicate that although the AIT could play a meaningful role in addressing interprovincial trade barriers in Canada's electricity sector, it may not be the most effective mechanism for specifically facilitating electricity trade between Québec and Ontario. It is possible that proceeding bilaterally with agreements such as the Ontario and Québec Trade and Cooperation Agreement might be the best way to address the trade barriers between the two provinces, given the relative ease through which bilateral agreements have been reached in comparison to the difficulties experienced in relation to the AIT negotiations.

# Foreword

This major paper satisfies learning objectives under all four Components of my Area of Concentration. My Plan of Study ("POS") breaks down my Area of Concentration, "Planning for Energy Sustainability in Ontario" into the following components: Renewable Energy; Land Use, Energy and Resource Planning Law and Policy; Environmental and Energy Law and Policy; and Interjurisdictional Trade Law.

### 1. Renewable Energy

In my POS, I express an interest in obtaining a working knowledge of solar power, wind power and other renewables. I took courses in the MES year of my program on those topics, and have gained practical knowledge of how renewable energy projects are implemented. This major paper has allowed me to do in-depth research on a renewable energy source that I had not previously looked at – hydro power.

Included in my POS is the Learning Objective of becoming familiar with the social, technical and political obstacles to the widespread adoption of renewable energy technologies. In my major paper, I look at whether the AIT would be a useful tool for addressing current internal trade barriers in Canada's electricity sector in order to facilitate interprovincial electricity trade. This has required me to research what technical, regulatory, political and cultural barriers are currently driving Ontario's decision to rely mainly on non-renewable resources as its main source of electricity.

### 2. Land Use, Energy and Resource Planning Law and Policy

My POS sets out the goal of obtaining a working knowledge of the key planning decision-making and dispute-settlement bodies in Ontario. For my major paper, I have researched the main federal electricity sector decision-makers in Canada, and their provincial-level counterparts in Ontario and Québec. I have looked at how their histories and involvement in the energy sector has affected their specific roles in shaping Canada's policies around energy planning.

### 3. Environmental and Energy Law and Policy

Looking at the role of federal and provincial agencies in the energy planning process has allowed me to address Learning Objective 3.1 of my POS by familiarizing myself with the roles of the provincial and federal governments in the decision-making process. My major paper has also required me to become familiar with Canadian internal trade law in the form of the AIT. My analysis of the agreement's utility to promote hydroelectricity imports from Québec to Ontario has allowed me to examine ways in which the agreement could help to promote sustainability in Canada's electricity sector.

### 4. Interjurisdictional Trade Law

My POS sets out the Learning Objective of obtaining a working knowledge of the principles informing international trade law. Understanding these principles was important to understanding the context in which the AIT was developed in Canada, since many of the same

ideas around the benefits of free trade that have shaped international agreements have also informed the development of the AIT.

# Acknowledgements

I would like to thank my supervisor, Mark Winfield, for encouraging me to look for the deeper issues underlying the current state of Canada's electricity sector. I would also like to thank Professors Stepan Wood and Dayna Scott, and all the other excellent faculty members at the Faculty of Environmental Studies and Osgoode Hall Law School that I have had the pleasure of interacting with. Their guidance throughout the MES/JD program has made this work possible.

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# Contents

# 1. Introduction

Human-induced climate change is constantly becoming a more urgent issue, and is receiving increased attention on the world stage. The importance of addressing global warming is especially relevant this year, with the 21st session of the Conference of the Parties ("COP21") having been recently held in Paris.[1] A new sense of optimism has been built around this conference,[2] and American President Barack Obama has stated that it could represent a "turning point" in global efforts to limit future temperature rises.[3] More than 190 Nations took part in the negotiations to achieve what 2009 talks in Copenhagen failed to do by establishing a "bigger, bolder, wider-ranging and more sophisticated" agreement than the 1997 Kyoto Protocol.[4] The agreement reached in Paris has been characterized as the first-ever universal, legally binding global climate deal.[5] With this renewed focus on achieving concrete measures to combat the progression of global climate change, Canada has a long way to go to set itself up as a world climate leader. An important step for the country will be to work cooperatively to increase the role of renewable resources in the Canadian economy.

Canada's environmental policies (or lack thereof) over the past few years, such as its focus on fossil fuel extraction and its withdrawal from the Kyoto Protocol,[6] have led to it being recognized as one of the worst global actors around the issue of climate change. International

[1] For more information on COP21, see: iisd Reporting Services, *Event: UNFCC COP 21*, online: Climate Change Policy & Practice <http://climate-l.iisd.org>.
[2] Jeff Tollefson, "Pledges raise hopes ahead of climate talks" (2015) 527 Nature 418.
[3] "COP21: Paris conference could be climate turning point, says Obama", *BBC News* (30 November 2015) online: BBC News <http://www.bbc.com>.
[4] David Shukman, "Paris climate summit: Don't mention Copenhagen", *BBC News* (16 September 2015) online: BBC News <http://www.bbc.com>; for information on the goals of the Copenhagen conference, see e.g. "Q&A: The Copenhagen climate summit", *BBC News* (21 December 2009) online: BBC News <http://news.bbc.co.uk>;
[5] Highlights of the Paris Agreement can be found at: European Commission, *Paris Agreement,* online: Climate Action <http://ec.europa.eu/clima/>.
[6] "Canada pulls out of Kyoto Protocol", *CBC News* (12 December 2011) online: CBC News <http://www.cbc.ca>.

attention has repeatedly been bestowed upon Canada as a climate "fossil",[7] demonstrating the country's reputation of holding back any serious global progress to slow the warming climate. However, recent developments indicate Canada's potential to become a leader rather than a laggard in the fight against climate change.

In the absence of federal leadership on the issues of energy policy and climate change, Canadian provinces have taken it upon themselves to develop their own systems for limiting the burning of fossil fuels. Provinces such as Québec, Ontario and British Columbia have proven themselves to be leaders in this regard. One by one, Canada's provincial governments have taken measures to limit carbon emissions in order to achieve their own greenhouse gas ("GHG") reduction targets.

Oil-rich Alberta has had a carbon levy in place for the past eight years, and Premier Rachel Notley has expressed her intention to double that levy over the next two years.[8] British Columbia followed suit by bringing in a carbon tax in July 2008.[9] Québec implemented a cap-and-trade system in January 2013, which it joined to California's cap-and-trade system under the Western Climate Initiative ("WCI") in January 2014.[10]

As of April 2014, the province of Ontario completed the process of phasing out all of its coal-fired electricity generation.[11] Although originally branded as a measure to protect air quality and public health,[12] this was also a major step towards reducing the province's GHG emissions

[7] "Canada wins 'Lifetime Unachievement' Fossil award at Warsaw climate talks", *Climate Action Network* (22 November 2013) online: Climate Action Network <http://climateactionnetwork.ca>.
[8] Justin Giovanetti, "Alberta to double carbon tax by 2017, strengthen emissions reduction targets", *The Globe and Mail* (25 June 2015) online: The Globe and Mail <http://www.theglobeandmail.com>.
[9] "Carbon Tax: Overview of the revenue-neutral carbon tax" online: British Columbia Ministry of Finance <http://www.fin.gov.bc.ca>.
[10] "The Carbon Market" online: Government of Québec <http://mddelcc.gouv.qc.ca>.
[11] Ministry of Energy, News Release, "Creating Cleaner Air in Ontario: Province Has Eliminated Coal-Fired Generation" (15 April 2014) online: Newsroom <http://news.ontario.ca>.
[12] Derek Leahy, "Ontario's Electricity Is Officially Coal Free", *DesmogCanada* (19 April 2014) online: DesmogCanada <www.desmog.ca>.

and a move to less carbon-intensive energy infrastructure as part of the province's 2013 Long Term Energy Plan.[13] Ontario has indicated its intention to become an active member of the WCI along with Québec and California by implementing its own cap-and-trade system.[14] Active participation in the WCI would bring Ontario closer to achieving its GHG emission reduction goals of 15 per cent below 1990 levels by the year 2020, and 80 per cent below 1990 levels by 2050.[15]

Although Ontario and Quebec's participation in the WCI demonstrates movement towards greater interprovincial cooperation on the issue of climate change, initiatives undertaken in Canada to date have remained at the sub-national level. With each individual Canadian province pursuing its own carbon reduction strategies, no concerted efforts have been made towards curbing carbon emissions in Canada as a whole. A much higher degree of federal leadership would be required to develop any semblance of a national climate change strategy, but federal regulators could have an important role to play in coordinating interprovincial initiatives in order to reduce Canada's overall carbon emissions.

Reducing emissions from the energy sector is an important starting point for Canada's response to climate change. There is a growing recognition that "[e]nergy strategy and climate strategy are one and the same thing, not separate policy domains as they are so frequently understood to be".[16] In July 2015, premiers of the various Canadian provinces and territories met in St. John's, Newfoundland and Labrador, to discuss a national energy strategy.[17] Although oil-

[13] Ontario Ministry of Energy, *Achieving Balance: Ontario's Long-Term Energy Plan* (Toronto: Ministry of Energy, 2013) [*Ontario's 2013 LTEP*].
[14] Office of the Premier, News Release, "Cap and Trade System to Limit Greenhouse Gas Pollution in Ontario" (13 April 2015) online: Newsroom <http://news.ontario.ca> [Cap and Trade System News Release].
[15] Robert Benzie, "Ontario outlines options for cap-and-trade scheme to reduce emissions" (13 November 2015) online: The Toronto Star <http://www.thestar.com>.
[16] Simon Dalby, "Is Canada's economic future free of fossil fuels?" (13 January 2016), online: OpenCanada.org <http://www.opencanada.org>.
[17] Jane Taber & Adrian Morrow, "Premiers agree on energy strategy with weakened climate change pledges" *The Globe and Mail* (17 July 2015) online: The Globe and Mail <http://theglobeandmail.com>; a statement by the Premiers from that meeting is available at Heather Maclean, "Premiers support joint action on climate change"

rich provinces such as Alberta and Saskatchewan took this meeting as an opportunity to ensure that their resources can get to market, [18] there has been some movement by the governments of Québec and Ontario to use a national energy strategy as a means for making sure that all Canadian provinces are committed to cutting carbon emissions in the energy sector.[19] Experts have suggested that getting all provinces on the same page and adopting a multi-faceted approach to addressing climate change is the best strategy for moving towards a low-carbon future. In an interview with the Canadian Broadcasting Corporation's radio show *The Current* in November 2015, Professor Mark Jaccard of Simon Fraser University suggested that a mix of the strategies already implemented by each individual province is the most worthwhile approach, but that there is a serious need for the federal government to become involved in order to coordinate among the various provinces.[20]

With a new federal government having taken power in Canada in fall 2015, recent developments indicate that Professor Jaccard's suggestion could become a reality. Prime Minister Justin Trudeau has made his intention clear to cooperate with provincial and territorial governments by inviting Canada's premiers to accompany him as part of Canada's delegation at the COP21 meeting in Paris,[21] stating that "[t]o fight climate change, we're all in this together".[22]

Although national cooperation to reduce GHG emissions from Canada's energy sector has not yet materialized, steps have been taken to facilitate interprovincial cooperation in a variety of

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Office of the Premier, Government of Newfoundland and Labrador, online: Canada's Premiers <http://canadaspremiers.ca>.

[18] Adrian Morrow, "What you need to know about the Canadian Energy Strategy", *The Globe and Mail* (15 July 2015) online: The Globe and Mail <http://www.theglobeandmail.com>.

[19] *Ibid*.

[20] Radio panel of Mark Jaccard and Gordon McBean (30 November 2015) on *The Current Special Edition: Two Degrees*, CBC Radio, Toronto.

[21] "'Canada is back,' Trudeau tells delegates at COP21 in Paris" (30 November 2015) online: <http://www.ctvnews.ca>.

[22] Ryan Maloney, "Trudeau Tweets COP21 Photo With Leaders, Says 'We're All In This Together'", *The Huffington Post Canada* (30 November 2015) online: The Huffington Post Canada <http://www.huffingtonpost.ca>.

areas. One such initiative has focused on removing barriers to interprovincial trade. The Agreement on Internal Trade ("AIT")[23] was signed on July 18 1994 and came into force in 1995[24] as a means of reducing interprovincial trade barriers and increasing the beneficial impacts of trade between the Canadian provinces and territories. It contains chapters focusing on a number of subject-areas, including such topics as Investment, Labour Mobility and Natural Resources Processing. Chapter Twelve of the AIT was meant to focus on Energy, but remains as-of-yet unfinished. Although the AIT was designed with a traditional neo-liberal concept of free-trade in mind, the agreement may have the potential to render Canada's energy sector more sustainable.

Increased electricity trade between the provinces of Ontario and Québec has been suggested in recent months as a potential strategy for increasing interprovincial cooperation on the issue of climate change, developing a more sustainable electricity sector in Canada, and helping the two provinces to make strides both economically and environmentally. Two workshops were held in January and April 2015 in Toronto and Montréal respectively, in order to explore the potential for increased energy trade between the two provinces. A summary report titled *Ontario, Québec, Electricity and Climate Change: Advancing the Dialogue*[25] ("*Advancing the Dialogue"*) was subsequently published, outlining the findings of these two workshops.

In this paper, I will examine whether the time is right for an energy chapter to be finalized and added to the AIT, and what that energy chapter should contain. Specifically, I will focus on the potential AIT chapter's ability to facilitate internal trade between Canadian provinces and whether drafting an AIT energy chapter could be a useful step in moving forward with greater

[23] *Agreement on Internal Trade: Consolidated Version* (Winnipeg: Internal Trade Secretariat, 2015) [AIT].
[24] "Agreement on Internal Trade (AIT)" (20 September 2005) online: Library of Parliament <http://www.parl.gc.ca>.
[25] James Gaede, *Ontario, Québec, Electricity and Climate Change: Advancing the Dialogue,* Studies in Ontario Electricity Policy Series Paper No 6, translated by Pascale Giroux-Denis (9 July 2015) [*Advancing the Dialogue*].

electricity collaboration between Québec and Ontario. Although the chapter would apply to Canada's energy sector as a whole, including areas such as the fossil fuel industry, I will focus specifically on the AIT's effects on electricity trade and its potential to aid in achieving the benefits outlined in *Advancing the Dialogue*.

After briefly going over the key benefits that electricity collaboration between Ontario and Québec could bring to the two provinces, I will describe the nature of trade barriers generally, and the existing literature on internal trade barriers in Canada. That section will highlight the ways in which the Canadian federal system can create internal trade barriers. That will be followed by an overview of the current regulatory regime in Canada's electricity sector outlining the key agencies involved in the development and implementation of energy policies at the federal level, and provincially in Québec and Ontario. I will then give an overview of the potential technical and regulatory barriers to interprovincial electricity trade between Ontario and Québec, coming to the conclusion that they could be overcome with sufficient political will. The disjointed nature of the Canadian regulatory regime seems to largely be the result of political and cultural barriers, which will also be discussed. I will then turn my attention to tracing the history and key principles of the AIT. I will examine the reasons for which it was originally drafted, what it seeks to accomplish, and how successful it has been at achieving its goals. Finally, I will point out ways in which an AIT energy chapter could help to facilitate electricity trade between Ontario and Québec, using other agreements and the already-drafted AIT chapters as examples of the form that a potential energy chapter could take. I will discuss how drafting an AIT energy chapter could advance the developing partnership between Ontario and Québec along with recently signed memoranda of understanding ("MOUs") and the *Advancing the Dialogue* report, by cementing the political will that has been demonstrated lately in relation to this issue.

In order to accomplish the goals set out above, I will need to establish a framework through which to address the issues I have described. Although hydroelectricity is often considered to be environmentally benign, it has come under scrutiny in the past for the potential impacts that large hydroelectric projects can have on the local environment as well as the traditional territories of First Nations.[26] The pros and cons of hydro power are beyond the scope of this paper. Under Ontario's most recent Long Term Energy Plan it is considered a renewable energy resource, [27] and I will be considering it as such for the purposes of my own research.

The benefits of obtaining increased hydro power from Québec are outlined in the *Advancing the Dialogue* report, and I will not be addressing them here in great detail. Based on that report and Ontario's current energy strategy to increase the province's reliance on renewable energy, I will be considering greater access to hydroelectricity from Québec as a positive outcome. For this reason, any headway that can be made in eliminating internal barriers to the trade of electricity between the two provinces will also be assessed favorably. Therefore, my goal is to examine ways in which a new AIT energy chapter could eliminate any such barriers in order to facilitate internal electricity trade, especially if those strategies can help to ensure a reliable source of clean electricity from Québec.

I must also acknowledge that increasing the portion of electricity that Ontario imports from Québec, even if it is from renewable sources, will not necessarily reduce overall greenhouse gas emissions when calculated on a regional scale. It is possible that an increase in hydroelectricity from Québec onto the Ontario grid will mean a reduction of clean energy going to the Northeastern

[26] See for example Graham Lane, *Dam-Nation: Rolling the Dice on Manitoba's Future* (Frontier Centre for Public Policy, 2013); Markus Schorbus & Dave Rodenhuis, *Assessing Hydrologic Impacts on Water Resources in BC: Summary Report: Joint Workshop, BC Hydro, 20 April 2010*, (Pacific Climate Impacts Consortium, University of Victoria, 2010); and Philip M Fearnside, "Environmental and Social Impacts of Hydroelectric Dams in Brazilian Amazonia: Implications for the Aluminum Industry" (2016) 77 World Development 48.
[27] *Ontario's 2013 LTEP*, *supra* note 13 at 6.

United States, which is currently the greatest importer of Québec's electricity.[28] This may result in the net amount of greenhouse gas emissions in the region remaining constant, or even going up, if such a reduction in clean hydropower to the United States is replaced by other, dirtier sources of electricity. However, that is also beyond the scope of the current paper. I am approaching this issue from a Canadian standpoint, and one specifically focusing on energy planning in the province of Ontario. Although the discussion will also touch on electricity policy and infrastructure in Québec, and will tie into the broader debate around a national energy strategy in Canada, my main focus remains on the province of Ontario and working towards its GHG reduction targets. As such, any reduction in Ontario's reliance on non-renewable resources will be considered a positive outcome, without going into speculation on whether it could result in increased emissions from areas outside of the province's jurisdiction.

With the above considerations in mind, I hope that the following analysis will be useful in imagining what contributions a new AIT energy chapter could make towards developing a more sustainable electricity grid in Ontario.

# 2. The potential benefits of interprovincial electricity trade

An increase in electricity trade between Québec and Ontario could benefit the two provinces in a number of ways, as outlined in *Advancing the Dialogue*. It could allow for less infrastructure to be built to accommodate the provinces' peak demands. This would be in the form of a capacity-swap agreement that would allow each province to import electricity from the other when its own demand is highest. This arrangement is a good fit for the situation of Québec and

[28] See Mourad Ben Amor et al, "Electricity trade and GHG emissions: Assessment of Quebec's hydropower in the Northeastern American market (2006-2008)" (2011) 39 Energy Policy 1711 [Ben Amor, "Quebec Electricity Trade"].

Ontario since the former is a winter-peaking jurisdiction while the latter's highest demand occurs in the summer.[29]

Ontario's most recent Long-Term Energy Plan recognizes that an import arrangement with a neighboring jurisdiction could offer a "cost-effective alternative to building domestic supply".[30] Notably, it could help Ontario to increase the amount of electricity that it receives from renewable sources, thereby reducing the province's reliance on more carbon-intensive technologies such as natural gas. This could prove to be especially important while the province goes through with nuclear refurbishments and requires a temporary source of electricity to fill the void left by the offline nuclear plants. Hydro power from Québec also has the potential to eliminate the necessity for nuclear refurbishments at all, and it could reduce the need for natural gas and other carbon-emitting energy sources in the long term. Its ability to store excess energy and respond in real-time to the fluctuating needs of the electricity grid also mean that it could provide increased flexibility. This makes it especially compatible with intermittent renewable sources like wind and solar, [31] on which the province of Ontario is also aiming to increase its reliance.[32]

Québec is the largest producer of electricity in Canada, with almost all of its electricity production coming from low-carbon hydro power.[33] Hydroelectricity makes up 91 per cent of Québec's installed capacity[34] and more than 99 per cent of the province's actual electricity generation.[35] Québec has a total installed generation capacity of 41,018 megawatts and the ability

[29] *Advancing the Dialogue, supra* note 25 at 31.
[30] *Ontario's 2013 LTEP*, *supra* note 13 at 45.
[31] Stéphane Bordeleau, "Where Canada's surplus energy goes", *CBC News* (30 March 2011) online: CBC News <http://www.cbc.ca>.
[32] *Ontario's 2013 LTEP*, *supra* note 13 at 24.
[33] Canada, National Energy Board, *Canadian Electricity: Trends and Issues* (Calgary: National Energy Board, 2001) at 41 [NEB, *Trends and Issues*].
[34] Ben Amor, "Quebec Electricity Trade", *supra* note 28 at 1711.
[35] Hydro-Québec, *Our Energy*, online: Hydro-Québec <http://www.hydroquebec.com>; Roger Lanoue & Normand Mousseau, *Maîtriser notre avenir énergétique : Pour le bénéfice économique, environnemental et social de tous*

to export 8380 megawatts, approximately 20 per cent of its total.[36] It tends to produce large excesses of electricity,[37] and currently sells much of this surplus to consumers in the Northeastern United States.[38]

With recent developments in the natural gas market resulting in depressed electricity prices in the Northeastern US, Québec has seen the value of its electricity exports stagnate at around three to four cents per kilowatt hour, even as the quantity has increased.[39] According to a report by Équiterre and the Ontario Clean Air Alliance, the price that Québec receives for its exported electricity fell by 50 per cent between 2008 and 2012.[40] Given the lower revenue generated by its electricity exports in recent years, Québec could feel potential financial benefits from increased energy trade with Ontario, where the cost to refurbish the Darlington nuclear plant alone is expected to be around 8.7 cents per kilowatt hour. The *Advancing the Dialogue* report suggests that if Québec and Ontario were to meet in the middle by negotiating a trade agreement to import electricity from the former into the latter at a price of approximately six cents per kilowatt hour, both provinces could benefit by approximately 14 billion dollars over the course of 20 years.[41] This type of cooperation is also a step in the right direction towards a national energy strategy in Canada, and could help to keep electricity prices in Ontario low once the province becomes an active partner in the WCI by reducing the need for natural gas-fired electricity generation.[42]

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(Montréal : Commission sur les enjeux énergétiques du Québec, 2014) at 67 [Lanoue & Mousseau, *Maîtriser notre avenir énergétique*].

[36] Ben Amor, "Quebec Electricity Trade", *supra* note 28 at 1711.

[37] Lanoue & Mousseau, *Maîtriser notre avenir énergétique*, *supra* note 35 at 105.

[38] For a breakdown of Québec's electricity exports to neighbouring jurisdictions, see Ben Amor, "Quebec Electricity Trade", *supra* note 28.

[39] *Advancing the Dialogue*, *supra* note 25 at i.

[40] Équiterre & Ontario Clean Air Alliance Research, *Exporting Electricity: To Promote Greater Collaboration Between Québec and Ontario* (June 2014).

[41] *Advancing the Dialogue*, *supra* note 25 at 29.

[42] *Ibid* at 27.

Given the potential benefits from interprovincial electricity trade discussed at the conferences in Toronto and Montréal, the *Advancing the Dialogue* report identifies three potential routes for collaboration that could be taken by Québec and Ontario. The first involves a small-scale agreement to swap capacity in the summer and winter according to each province's peak demand. The second option would see the two provinces enter into a longer-term, larger-scale agreement to either replace the need for natural gas-fired generation during Ontario's nuclear refurbishments or to eliminate the need for nuclear refurbishments altogether, allowing Ontario's nuclear plants to be decommissioned once they reach the end of their life-cycles. The third option would see Québec and Ontario enter into a "grand bargain" by building on the second option. It would incorporate the two provinces' involvement in the WCI and use Québec's hydro capacity to store excess energy generated by Ontario's growing intermittent renewable energy sector.[43] Each of these options could benefit from a reduction of Canada's internal trade barriers in order to facilitate the process of designing the necessary trade agreements.

# 3. Internal trade barriers

Answering the question of whether an AIT energy chapter would be useful for facilitating increased electricity trade between the provinces of Ontario and Québec requires us to consider what barriers currently exist to interprovincial electricity trade in Canada.

## The concept of free trade

As an economic concept, free trade is centered on the theory of comparative advantage. This theory is based on the idea that some trading partners tend to have relative advantages over others in producing certain types of products and services, and that everyone would be better off

[43] *Advancing the Dialogue*, *supra* note 25 at ii.

if each trading partner specialized in the production in which they have an advantage.[44] The move towards freer trade began in the wake of the high-tariff protectionism of the 1930s,[45] and free trade as an operating concept became more widespread after the Second World War, with efforts to liberalize international trade through successive rounds of negotiations under the General Agreement on Tariffs and Trade ("GATT").[46] Global international trade initiatives have resulted in a number of subsequent free trade agreements.[47] Trade barriers are not, however, only an international phenomenon, and studies have shown that international trade has increased drastically over recent decades while interprovincial exports within Canada have gone steadily down,[48] indicating that interprovincial trade barriers are present within Canada's domestic economy. In fact, former federal Industry Minister James Moore has acknowledged that trade deals with the United States and Europe have meant that trade is easier internationally between Canada and foreign markets than it is domestically between Canadian provinces.[49]

## Trade barriers within Canada

There are indications that internal trade barriers do have an impact on the Canadian economy. Although studies to quantify intra-provincial and inter-provincial trade costs in Canada at the sectoral level are relatively new,[50] authors such as Agnosteva *et al* have shown that trade barriers do exist between Canadian provinces to varying degrees in multiple different industries.

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[44] For a discussion on the principles underlying international free trade, including comparative advantage, see for example Michael J Trebilcock & Robert W Howse, *The regulation of international trade*, 3d ed (London: Routledge, 2005).
[45] Michael Hart, "The end of trade policy?" in *Canada among nations: 1993-94* (Ottawa: Carleton University Press, 1993).
[46] G Bruce Doern & Mark MacDonald, *Free-Trade Federalism: Negotiating the Canadian Agreement on Internal Trade* (Toronto: University of Toronto Press, 1999) at 5 [Doern & MacDonald, *Free-Trade Federalism*].
[47] A list of Canada's international free trade agreements can be found at *Canada's Free Trade Agreements*, online: Global Affairs Canada <http://www.international.gc.ca>.
[48] Patrick Grady & Kathleen Macmillan, "Why is interprovincial trade down and international trade up?" (1998) 6:4 Canadian Business Economics 26 at 26.
[49] Barrie McKenna, "Canada's internal trade barriers must fall", *The Globe and Mail* (14 June 2015) online: The Globe and Mail <http://www.theglobeandmail.com> [McKenna, "Canada's internal trade barriers must fall"].
[50] Delina Agnosteva et al, *Internal Trade Costs in Canada* (Public Policy Forum, 2013) at 5.

In their study comparing what Canadian provinces consume from their own production versus what they receive through trade with each other, Tombe and Winter found the overall trade cost between Ontario and Québec to be approximately 40 per cent.[51] Many authors have argued that this prevalence of trade barriers between Canadian provinces can be largely traced back to the fact that Canada operates under of a federalist system, with a constitutional division of powers between the federal and provincial governments.[52]

Doern and MacDonald assert that the details of federal systems of governance play a large role in how internal trade issues are approached within countries, stating that the "division of powers between levels of government will […] have some effect on what kind of internal common market is intended to exist in a federation".[53] In early federations such as Canada, internal trade was generally addressed in the assignment of power over interprovincial trade and commerce to the federal government.[54] The Canadian federal government enjoys this power, and has constitutional jurisdiction over interprovincial trade pursuant to its ability to regulate trade and commerce under section 91(2) of the *Constitution Act, 1867*.[55] This does not however mean that potential trade barriers between provinces within a federation are all addressed through the division of powers, or that this was the case in Canada. Indeed, Canada's federal system of government has been identified as the root of the country's interprovincial barriers to trade.[56]

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[51] Trevor Tombe & Jennifer Winter, "Internal Trade and Aggregate Productivity: Evidence from Canada" (2013) [unpublished, archived by the Canadian Economics Association] online: Canadian Economics Association <http://economics.ca> at 1.
[52] See, for example: Eugene Beaulieu, *Exploring the Economic Impact of AIT Chapters,* prepared for Public Policy Forum (Calgary: University of Calgary, 2013) at 5 [Beaulieu, *Economic Impact of the AIT*].
[53] Doern & MacDonald, *Free-Trade Federalism, supra* note 46 at 6.
[54] *Ibid* at 6.
[55] *Constitution Act, 1867,* 30 & 31 Vict, c 3 (UK), s 91(2) [*Constitution Act, 1867*].
[56] Beaulieu, *Economic Impact of the AIT, supra* note 52 at 5.

Section 121 of the *Constitution Act, 1867*[57] addresses the issue of interprovincial trade by stating that "[a]ll articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces." It has however been pointed out that Section 121 does not address non-tariff internal trade barriers, capital, services or labour, "each of which has been the focal point of many interprovincial trade flow restrictions".[58]

Internal trade barriers can take a number of shapes, but are often in the form of differences between provincial regulatory schemes. As an example, a 2013 article in Maclean's magazine highlighted the situation of restaurant-owner and gourmet food packager Jennifer Warren-Part from Gatineau Hills, Québec. [59] As quoted in the article, Warren-Part cites the governments of Ontario and Québec's reluctance to recognize each other's food-safety laws as a barrier preventing the Québec restaurant-owner from selling some of her produce on the other side of the provincial border. The article points out that the provinces aren't obliged to accept each other's standards, and that even though big food companies can get federal licenses to ship in bulk across provincial boundaries, those federal regulations are not amenable to small artisanal producers. The article gives a few other examples of sectors in which interprovincial trade barriers are apparent, including the wine and gasoline industries.

Although the examples of trade barriers discussed in the Maclean's article are not specific to interprovincial electricity trade, they speak to the type of barriers that are not readily apparent and yet which can have severe impacts on free trade between provinces. It is clear that

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[57] *Constitution Act, 1867, supra* note 55. The federal and provincial division of powers is set out in sections 91 and 92.
[58] E Wayne Clendenning & Robert J Clendenning, *Analysis of International Trade Dispute Settlement Mechanisms and Implications for Canada's Agreement on Internal Trade*, Occasional Paper Number 19 (Ottawa: Industry Canada 1997) at p 36 [Clendenning & Clendenning, *International Trade Dispute Settlement Mechanisms*].
[59] John Geddes & Nick Taylor-Vaisey, "Home is where the trade barriers are", *Maclean's* (29 October 2013) online: Macleans.ca <http://www.macleans.ca>.

interprovincial trade barriers exist and that they can limit the free flow of goods and services between Canadian jurisdictions. It was in fact a recognition that the Canadian internal market had too many barriers (often in the shape of excessively interventionist provincial government policies) that precipitated the creation of the AIT.[60] At the time of the AIT's creation, comparisons were drawn between Canada and the United States, and even Canada and Europe, suggesting that those other jurisdictions enjoyed "a more open and fulsome economic union".[61] With specific regards to the United States, the American political system was not only seen as endorsing capitalism, free markets, and limited government, but also of pursuing more vigilant policies regarding the defense of interstate commerce and competition.[62] In Canada, perhaps because of the country's federalist structure, it has been recognized that the restrictions experienced on the flow of goods and services are the result of a lack of coordination between different levels of government in developing regulations and regulatory measures, resulting in unnecessary duplication and compliance costs.[63]

# 4. The electricity sector regulatory regime

The disjointed nature of Canada's electricity sector regulatory regime is one of the greatest barriers that the AIT energy chapter would have to address. The number of agencies involved in electricity planning in Canada make achieving a coordinated vision a complicated process. Lack of synergy among different regulators is a potential barrier to interprovincial electricity trade, but could be addressed through greater coordination. The following section highlights some of the key actors in the Canadian, Québec and Ontario electricity sectors.

[60] Doern & MacDonald, *Free-Trade Federalism*, *supra* note 46 at 6.
[61] *Ibid*.
[62] *Ibid*.
[63] Beaulieu, *Economic Impact of the AIT*, *supra* note 52 at 5.

## The National Energy Board

The National Energy Board ("NEB") is Canada's main federal energy regulator. Doern and Gattinger describe a broad evolution of the NEB's role in Canada's energy sector over three main periods since 1947, roughly corresponding to different levels of reliance on markets versus state intervention as an influence over the nature and pace of energy and resource development.[64] The reasons behind the NEB's establishment in 1959, besides the regulation of west-east pipelines, were largely focused on advising the federal government on broad energy matters and regulating the export of oil, gas and electricity.[65] From the outset, the NEB's primary function was to be a sectoral planner, using its powers to regulate interprovincial pipelines and exports of oil, natural gas and electricity, in order to ensure that Canada could meet its long-term needs.[66] Within just a few years of its creation, the NEB had cemented its role as the primary policy adviser to the federal government on energy issues.[67] Within a decade, however, the NEB was displaced as a key policy advisor based largely on a growing concern that it was too close to industry and that the government in Ottawa was too dependent on its information.[68] This led to the NEB's replacement as primary policy advisor by the Department of Energy, Mines and Resources, and the assumption of some of the NEB's regulatory functions by the government and other agencies.[69] In the 1980s, the NEB was completely displaced from its role as regulatory agency and policy adviser with the announcement of a National Energy Program ("NEP") in Canada. However, when the Mulroney

[64] Bruce G Doern & Monica Gattinger, *Power switch: energy regulatory governance in the twenty-first century* (Toronto: University of Toronto Press, 2003) at 97 [Doern & Gattinger, *Power Switch*].
[65] *Ibid* at 97.
[66] *Ibid* at 97-98.
[67] *Ibid* at 98.
[68] *Ibid* at 99.
[69] Bruce G Doern & Glen Toner, *The politics of energy: the development and implementation of the NEP* (Toronto: Methuen, 1985) c 11.

Conservative government took power in 1984 it subsequently dismantled the NEP, allowing the NEB to re-establish itself as part of the Canadian regulatory regime.[70]

Today, the NEB is described by Doern and Gattinger as "an independent federal regulatory tribunal which reports to Parliament through the minister of natural resources".[71] The board consists of no more than nine members, appointed to hold office in good behavior for a period of seven years.[72] According to the *National Energy Board Act* ("*NEB Act*"), the NEB functions as a court of record and has the authority to determine any matter where it appears that someone has violated the *NEB Act* or any regulation, certificate, license or permit made by the board.[73] The NEB's responsibilities include the regulation of interprovincial pipelines and powerlines, the import and export of energy as well as undertaking energy studies and providing advice to the Minister of Natural Resources and to Parliament upon request.[74]

The NEB's mandate focuses mainly on the oil and gas industry, concentrating on both interprovincial and international pipelines. It does not regulate interprovincial electricity trade.[75] Even so, there is room for the NEB to become involved in an advisory/coordination role. It already enforces measures to promote interprovincial trade, such as a Fair Market Access ("FMA") provision under section 119.06 (2)(c) of the *NEB Act*. This section requires that applicants for electricity export permits inform those interested in buying electricity in Canada of the quantities and classes of services available for sale, and that the applicants give the opportunity within a reasonable time for the electricity to be purchased for consumption in Canada on terms as favorable

[70] Doern & Gattinger, *Power Switch*, *supra* note 64 at 100.
[71] *Ibid* at 100.
[72] *Organization Profile – National Energy Board,* online: Government of Canada <http://www.appointments-nominations.gc.ca>.
[73] *National Energy Board Act*, RSC 1985, c N-7, s 12 [*NEB Act*].
[74] National Energy Board, *Responsibilities*, online: National Energy Board <http://www.neb-one.gc.ca>.
[75] *Advancing the Dialogue*, supra note 18 at iv.

as those specified in the application.[76] The NEB has shied away from stating outright that this section actually ensures a "right of first refusal", pointing out that the FMA provision "does not oblige an applicant to carry out any specific procedure such as allowing interception of its proposed exports". Rather, it describes the essential elements of the FMA provision as "the existence of an equal opportunity" and "an onus on both parties to negotiate in good faith".[77] Even with east-west electricity trade in Canada falling under the jurisdictions of provincial regulators rather than the NEB itself,[78] the federal agency does have the potential to help facilitate coordination among those provincial regulators through sectoral planning in order to encourage interprovincial cooperation.

## Provincial regulators

### Québec

The province of Québec is the largest electricity market in Canada, and is especially rich in hydroelectric resources.[79] Until the 1940s, Québec's electricity was provided by a number of small, privately-owned enterprises. This ended when, concerned over high electricity rates in comparison with those in the province of Ontario, the provincial government formed the crown corporation Hydro-Québec in 1944.[80] Although rural electricity provision was at first left in the hands of the Rural Electrification Agency, Québec's electricity system was made almost entirely public in 1963.[81] Hydro-Québec's mandate was to use the province of Québec's hydroelectric resources to generate electricity and ensure that all Québec residents had access to energy at

[76] *NEB Act*, *supra* note 73 s 119.06 (2)(c).
[77] National Energy Board, *Frequently Asked Questions (FAQ) about Fair Market Access*, online: National Energy Board <www.neb-one.gc.ca>.
[78] *Advancing the Dialogue*, *supra* note 18 at 47.
[79] NEB, *Trends and Issues*, *supra* note 33 at 40; *Hydro-Québec Production*, online: Hydro-Québec <http://www.hydroquebec.com>; Ministère des Ressources naturelles et de la Faune, *Using Energy To Build the Québec of Tomorrow* (Québec: Gouvernement du Québec, 2006).
[80] Ruth Dupré & Michel Patry, *Hydroelectricity and the State in Quebec and Ontario: Two Different Historical Paths*, in Deregulation of Electric Utilities, ed by Georges Zaccour (New York: Springer Science+Business Media, 1998).
[81] Robert Clark & Andrew Leach, *Energy Regulation in Québec*, Center for Interuniversity Research and Analysis on Organizations (December 2005) at 23 [Clark & Leach, *Energy Regulation in Québec*].

uniform rates, which were to be set no higher than to cover the corporation's investments and operational costs. [82] To this day the Québec market is almost entirely supplied by Hydro-Québec.[83]

As part of a new energy policy adopted by the government of Québec in the mid-1990s, the Régie de l'énergie ("Régie") was created in 1997 as an independent, quasi-judicial economic regulatory agency. The Régie is now responsible for regulating major energy markets in the province.[84] The *Act Respecting the Régie de l'énergie*[85] established the mandate of the Régie with regards to the electricity sector in order to:

- regulate monopoly activities related to the supply of electric power;
- ensure that market activities are to the benefit of consumers;
- encourage healthy competition among businesses;
- set the rates and service conditions for Hydro-Québec;
- set rates for electricity transmission; and
- approve contracts for the purchase, trade and export of electricity[86]

**Ontario**

The publicly owned crown corporation Ontario Hydro was the major player in Ontario's energy sector for most of the twentieth century, and functioned as both the main generator and transmitter of power. [87] However, the main electricity regulator in Ontario today is the Ontario Energy Board ("OEB"). The OEB was created in 1960 with the limited mandate of setting rates for the sale, distribution and storage of natural gas.[88] Although the role of the OEB has evolved

[82] Clark & Leach, *Energy Regulation in Québec* at 23; NEB, *Trends and Issues, supra* note 33 at 43.
[83] *Ibid*, NEB, *Trends and Issues* at 40.
[84] Clark & Leach, *Energy Regulation in Québec, supra* note 81 at 23.
[85] *An Act Respecting the Régie de l'énergie,* CQLR c R-6.01.
[86] NEB, *Trends and Issues, supra* note 33 at 43.
[87] *OEB Resource Guide Energy Sector Regulation: A Brief Overview*, online: Ontario Energy Board <http://www.ontarioenergyboard.ca> [*OEB Resource Guide*].
[88] *OEB Resource Guide, supra* note 87.

over the past half-century, Doern and Gattinger suggest that the OEB experienced much more uneven change over recent decades than did the NEB.[89] In the 1990s, Ontario's provincial government undertook drastic restructuring of the electricity sector including regulatory reforms to breakup Ontario Hydro, creating a wholesale electricity market and giving the OEB responsibility for regulating part of the electricity sector.[90] This resulted in the OEB becoming a regulatory agency with an expanded role in electricity as well as gas regulation, and a larger regulatory system now consisting of players such as the Ontario Cabinet, the Independent Market Operator ("IMO"), the federal Competition Bureau and the Ontario Hydro successor companies such as Hydro One.[91] The OEB is now an expanded, quasi-judicial tribunal for which the Minister of Energy has legislative responsibility.[92] Besides regulating all market participants in both the natural gas and electricity industries, it provides advice on energy matters referred to it by the Ministers of Science and of Natural Resources.[93]

In 2005, the IMO became the Independent Electricity System Operator ("IESO") through the introduction of Bill 100.[94] While oversight responsibility was assigned to the OEB, the IESO's mandate includes: balancing the province's supply and demand for electricity in real-time; planning for the province's medium- and long-term energy needs, as well as securing clean energy sources to meet those needs; overseeing the province's electricity wholesale market; and fostering the development of a culture of electricity conservation in Ontario.[95] Through its mandate to regulate investments in the expansion of the transmission grid, the OEB and IESO are to work

[89] Doern & Gattinger, *Power Switch*, *supra* note 64 at 114.
[90] *OEB Resource Guide*, *supra* note 87.
[91] Doern & Gattinger, *Power Switch*, *supra* note 64 at 114.
[92] *About the Ministry*, online: Ministry of Energy <http://www.energy.gov.on.ca>.
[93] Doern & Gattinger, *Power Switch*, *supra* note 64 at 117-118.
[94] *Electricity Restructuring Act*, 2004, SO 2004, c 23 – Bill 100.
[95] *About the IESO*, online: Independent Electricity System Operator <http://www.ieso.ca>.

together to ensure that adequate transmission capacity is developed in order to maintain reliability and to promote the growth of competition.[96]

In 2009, the IESO undertook its own report looking at the feasibility of greater cooperation in the electricity sector between Ontario and neighboring provinces and states, [97] at the request of the Minister of Energy. The report's focus was on the technical capabilities of Ontario's electrical interties with other jurisdictions, as well as possible infrastructure investments, commercial arrangements and market factors, in order to determine the practical feasibility of greater interprovincial energy system integration.[98] It specifically examined potential movement towards increased cooperation with Québec. Although it found that new infrastructure would have to be developed depending on the extent of a possible agreement,[99] the report concluded that the Ontario Power Authority ("OPA") and IESO should work together with Hydro-Québec "to explore opportunities for clean imports when such imports would have system benefits and are cost effective for Ontario ratepayers".[100] It also concluded that "the OPA should continue to evaluate and regularly update the Minster of Energy on the specific parameters for clean-energy import arrangements that would best meet Ontario's needs and circumstances".[101]

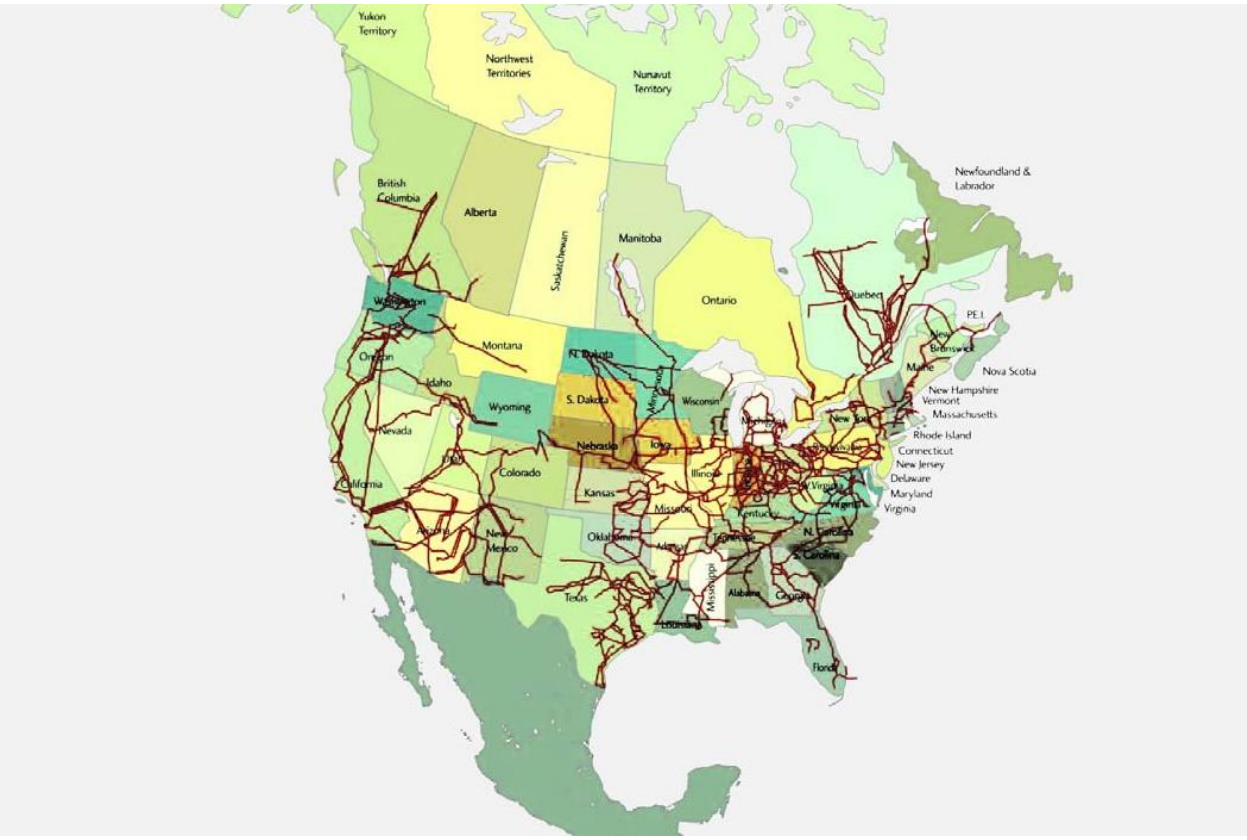
# 5. Trade barriers in the electricity sector

Internal trade barriers are present throughout the Canadian economy, and the electricity sector is no exception. For evidence of these trade barriers, one need simply look at the amount of electricity exported southward towards the United States in comparison to the electricity currently

[96] Doern & Gattinger, *Power Switch*, *supra* note 64 at 117.
[97] Ontario, Independent Electricity System Operator & Ontario Power Authority, prepared for the Minister of Energy, *Review of Ontario Interties* (2014) [IESO, *Review of Ontario Interties*].
[98] *Ibid* at 5.
[99] *Ibid* at 23-25.
[100] *Ibid* at 31.
[101] *Ibid*.

being traded between Canadian provinces. A 2010 report by the C.D. Howe Institute came to the conclusion that in 2008, Canada's total electricity exports to the United States were worth 3.8 billion dollars, while domestic interprovincial trade equaled just half a billion dollars.[102] Figure 1 illustrates the north-south orientation of Canada's electricity transmission infrastructure.

**Figure 1 – Major North American Electricity Transmission Lines**




Source: Jan Carr, *Power Sharing: Developing Inter-Provincial Electricity Trade,* C.D. Howe Institute Commentary (July 2010) at 2.

The placement of major North American electricity transmission lines demonstrates not just the different interconnectedness of Canada's electricity sector in comparison to that of the US – it also shows that Canadian provinces are currently equipped to export more electricity to American customers than to each other. In order to determine whether the AIT energy chapter

[102] Jan Carr, *Power Sharing: Developing Inter-Provincial Electricity Trade,* C.D. Howe Institute Commentary (July 2010) at 1.

could help to alter this trend, I will be examining the technical, regulatory and political/cultural barriers that have shaped the current state of Canada's electricity transmission infrastructure.

## Technical barriers

Ontario has the infrastructure capacity to import electricity from neighboring jurisdictions in the form of 26 interties with two provinces and three states.[103] Ontario already imports a limited amount of electricity from Québec, so the only remaining technical question is whether existing infrastructure is robust enough to import sufficient amounts of electricity or if new investments would be necessary. In its 2009 report on the state of Ontario's electrical interties to other jurisdictions, the IESO suggests a number of potential technical options for increasing Ontario's participation in interprovincial electricity trade.[104] Although it concludes that infrastructure investments would be required depending on the amount of future electricity transmitted between Québec and Ontario, the report states that a transmission upgrade in the Ottawa area will already be necessary around the year 2020 to meet local reliability needs.[105] The report breaks down the level of investment that would be needed to allow for various import scenarios. For example, it estimates that an investment of 325 million dollars would be required to allow for firm imports up to 1,000 megawatts through the Ottawa area, 500 million dollars for imports up to 1,800 megawatts, and an estimated 1.4 billion dollars for imports up to 3,300 megawatts.[106] Although these investments are significant, they are still far less than the 12.8 billion dollar refurbishment cost of the Darlington nuclear plant,[107] which generates 3,512 megawatts of electricity[108] – just

[103] IESO, *Review of Ontario Interties*, *supra* note 97 at 4.
[104] *Ibid* at 16.
[105] *Ibid* at 23.
[106] *Ibid* at 24-25.
[107] Ontario Power Generation, *Semi-Annual Performance Report*, online: Ontario Power Generation <http://www.opg.com>.
[108] Ontario Power Generation, *Darlington Nuclear*, online: Ontario Power Generation <http://www.opg.com>.

212 megawatts more than the most expensive import scenario examined by the IESO. It is therefore clear that the technical feasibility of the project is not an issue, and expanding Ontario's electrical interties could even be cheaper than refurbishing the province's nuclear plants.

With the technical feasibility of increased electricity trade over Ontario's interties having been assessed by the IESO, increased electricity trade between Ontario and Québec is mostly dependent on the political will of provincial governments and coordination among provincial and federal electricity regulators. When approving the refurbishment of the Darlington Nuclear facility in January 2016, Energy Minister Bob Chiarelli stated that the government was choosing to proceed with the nuclear refurbishment rather than opting for greater electricity imports from Québec because "[l]ong-term, permanent power from Quebec" was "not affordable because the infrastructure required makes it absolutely prohibitive to move forward".[109] Given that the minister's comments contradict the findings of the IESO, other reasons must be contributing to the government's reluctance to engage in electricity trade with Québec to a level that could replace some of Ontario's planned nuclear refurbishments. To address this issue, the AIT energy chapter would need to focus on tackling the political, cultural and regulatory obstacles currently hampering interprovincial electricity trade.

## Political and cultural barriers

In order to address the apparent reluctance of the Ontario Government to commit to electricity imports from Québec, we must first understand the factors that have given rise to this barrier to interprovincial trade. The existing literature on this subject seems to indicate that the factors currently fragmenting Canada's electricity sector are mostly political and cultural in nature.

[109] Adrian Morrow, "Ontario approves start of $12.8-billion upgrade to Darlington nuclear reactors" *The Globe and Mail* (11 Jan 2016) online: The Globe and Mail <http://theglobeandmail.com>.

The idea of large-scale interprovincial electricity trade is not new, with David Cass-Beggs having suggested in 1960 that Ontario use all of its available hydro-generating capacity along with some electricity from coal-fired plants, and import surplus electricity from Québec, Alberta, Saskatchewan and Manitoba.[110] However, the historic independence of the provinces from one another, their wish to be self-reliant, and previously unsuccessful electricity transmission partnerships seem to have prevented this type of integration from occurring, leading instead to the current state of disjointedness.

Pineau suggests that the historically provincial nature of Canada's electricity system has meant that many consumers see their local utilities as part of their culture and identity.[111] This can likely be traced all the way back to the provincial autonomy protected under Canada's federalist constitution, and has led to a resentment of "out-of-province interference" in the electricity sector and the belief that electricity should be consumed locally.[112] Canada's provincialist legacy of retaining complete provincial control over the electricity system in order to address only domestic interests has been recognized as a barrier to trade.[113]

In a recent interview on TVO's *The Agenda*,[114] Jack Gibbons of the Ontario Clean Air Alliance expressed his support for Ontario importing hydroelectricity from Québec and articulated reasons which may explain the provinces' current reluctance to engage in greater electricity trade. Citing a desire to be self-reliant on electricity, Gibbons used the term "electricity separatism" to describe the current mindset pervading Ontario's electricity sector. He traced this attitude back to

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[110] Karl Froschauer, *White gold: hydroelectric power in Canada* (Vancouver, BC: UBC Press, 1999) at 25-26 [Froschauer, *Hydroelectric power in Canada*].
[111] Pierre-Olivier Pineau, "Fragmented Markets: Canadian Electricity Sectors' Underperformance" in Fereidoon P Sioshansi, *Evolution of Global Electricity : New Paradigms, New Challenges, New Approaches* (Academic Press, 2013) at 386 [Pineau, "Fragmented Markets"].
[112] *Ibid* at 386.
[113] *Advancing the Dialogue, supra* note 25 at 44.
[114] Interview of Jack Gibbons by Steve Paikin (24 February 2016) on *The Agenda*, TVO, online: TVO <http://tvo.org> [Jack Gibbons, *The Agenda*].

the early 20th century, when Ontario still had large amounts of untapped hydro-electric resources. Karl Froschauer of Simon Fraser University has also suggested that a desire to develop untapped hydro-electric resources contributed to Canada's provincially-focused electricity sector, since provinces sought to "expand the generation of hydro-electricity in order to advance provincial industrial development and to profit from exports to the US".[115] According to Gibbons, this sentiment continued into the 1950s when nuclear power came into widespread use. The belief that the new technology would be "too cheap to meter" perpetuated the idea that Ontario should remain self-reliant on electricity. These ideas, according to Gibbons, have persisted "beyond their time period".[116] *The Agenda* host Steve Paikin asked Mr. Gibbons whether the concerns over being electricity self-reliant are not warranted, given that some commentators equate electricity security to "almost a national security issue".[117] In response, Gibbons pointed out that many resources upon which Ontario relies are imported from other jurisdictions, including nearly all of Ontario's natural gas, which comes predominantly from Alberta and Pennsylvania.[118]

Another potential disadvantage of importing hydroelectricity from Québec which was brought up in the interview involves the jobs that would be lost by shutting down generating plants in Ontario in favour of electricity imports. The issue of job creation was cited by the Ontario Government in a recent news release in which it committed to moving forward with nuclear refurbishments. Specifically, it stated that the Darlington nuclear refurbishment would contribute 15 billion dollars to Ontario's gross domestic product throughout the life of the project and create up to 11,800 jobs annually.[119] Gibbons, however, contends that Ontario's nuclear reactors should

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[115] Froschauer, *Hydroelectric power in Canada*, *supra* note 110 at 23.
[116] Jack Gibbons, *The Agenda*, *supra* note 114.
[117] *Ibid*.
[118] *Ibid*.
[119] Ministry of Energy, News Release, "Ontario Moving Forward with Nuclear Refurbishment at Darlington and Pursuing Continued Operations at Pickering to 2024" (11 January 2016) online: Newsroom <http://news.ontario.ca>.

be decommissioned when reach the end of their lives and replaced with hydroelectric imports. This suggestion is based on the estimate that, considering the high price of nuclear refurbishments, Ontario could save 600 million dollars annually by implementing this strategy.[120] As previously described in this paper in reference to technical barriers, the IESO's report on Ontario's electrical interties confirms that investing in transmission infrastructure could result in lower costs than proceeding with nuclear refurbishments. In response to the question of job loss, Gibbons points out that the money saved by importing electricity rather than refurbishing Ontario's nuclear plants could be used for infrastructure and other investments.[121] Ontario could potentially make up for the jobs that would be lost through shutting down power plants by investing in other areas of the economy.

The "electricity separatism" described by Mr. Gibbons on *The Agenda* may also be the result of previous negative experiences with interprovincial electricity trade. Most notably, the Upper Churchill Falls hydroelectricity contract of the 1970s has resulted in a distinct fear of energy "wheeling". In the early 1950s, Newfoundland Premier Joseph Smallwood invited the British Newfoundland Company (Brinco) to develop natural resources across the province. These included hydroelectric resources from Churchill Falls. Developments over the 1950s and 1960s, including Québec's refusal to allow electricity transmission from Labrador across Québec to other provinces, eventually led to Hydro-Québec signing a contract securing all the power generated from Churchill Falls for 65 years at a price of just one-quarter cent per kilowatt hour. [122] This electricity was then sold to the United States at high mark-ups, generating profits for Hydro-Québec. [123]

[120] Jack Gibbons, *The Agenda, supra* note 114.
[121] *Ibid*.
[122] Froschauer, *Hydroelectric power in Canada, supra* note 110 at 113.
[123] *Ibid*.

The animosity generated by this contract has limited the development of interprovincial electricity trade in the intervening years. When the idea of importing electricity from Newfoundland through Québec to Ontario was floated in the 1990s, the talks were scuttled due to Newfoundland Premier Danny Williams' animosity towards Hydro-Québec stemming from the Upper Churchill Falls hydroelectricity contract.[124] Thankfully, the Upper Churchill Falls example need not rule out interprovincial capacity-sharing agreements entirely, even as it serves as a lesson moving forward. Newfoundland's experience with Churchill Falls has demonstrated that the issue of electricity wheeling must be addressed in any interprovincial electricity contract, since it has contributed to the current reluctance of Canadian provinces to engage in a greater level of interprovincial cooperation. The *Advancing the Dialogue* report comes to the conclusion that the issue of electricity wheeling could be dealt with by an upfront agreement on the final destination of electricity.[125] Remaining aware of the potential for electricity wheeling could allow the provinces to negotiate contracts to appropriately address this concern.

## Regulatory barriers

Along with Canada's history of strong federalism, the political and cultural barriers described above seem to have contributed to the disjointed nature of Canada's electricity sector. The Canadian federal government has constitutional authority over the free-flow of goods and services between provinces under section 91(2) of the *Constitution Act, 1867*, and is involved in interprovincial and international energy trade and infrastructure.[126] The provinces, however, maintain sole authority to regulate the exploitation, development, conservation and management of non-renewable natural resources, forestry resources and electrical energy.[127] This means that

[124] *Advancing the Dialogue*, *supra* note 25 at 36.
[125] *Ibid* at 40.
[126] Pineau, "Fragmented Markets", *supra* note 111 at 367.
[127] *Constitution Act, 1867*, *supra* note 55, s 92A(1).

the regulation of electricity and other resources is fragmented under Canada's federal system, with national and provincial regulators each playing a role in its management. Monopolies by provincial electrical utilities discourage the most efficient use of energy resources,[128] resulting in Canadian electricity producers looking south of the border to get their product to market. This is especially true of the province of Québec which, between 2006 and 2008, exported nearly 13.5 times more electricity to New York and New England trading partners than to Ontario.[129]

Eugene Beaulieu of the University of Calgary Department of Economics has stated that the primary problem with respect to interprovincial trade in the energy sector stems from the regulatory environment, especially in the form of duplication of regulation in Canada's federal system.[130] As an example, he points out that pipelines crossing provincial or international borders to bring energy commodities from one province's market to another are subject to different regulatory paradigms than those which remain in the same province.[131] With specific regards to electricity, each province has its own policy and regulatory agency, leading to "disparate electricity tariffs, generation and transmission plans, and renewable/clean energy goals".[132] Pineau attributes the underperformance of Canada's internal electricity market to this fragmented approach.[133] It seems to mostly be a lack of coordination among the various federal and provincial regulators that is currently hampering interprovincial electricity trade, even where that trade could benefit multiple trading partners. There is nothing inherently incompatible between the electricity sectors of different provinces, so it is possible that greater coordination among the various federal and provincial regulators could lead to a more integrated interprovincial electricity trade regime.

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[128] McKenna, "Canada's internal trade barriers must fall", *supra* note 49.
[129] Ben Amor, "Quebec Electricity Trade", *supra* note 28 1714.
[130] Beaulieu, *Economic Impact of the AIT*, *supra* note 52 at 15.
[131] *Ibid*.
[132] Pineau, "Fragmented Markets", *supra* note 111 at 367.
[133] *Ibid*.

# 6. The Agreement on Internal Trade

Industry Canada's website states that the goal of the AIT is to "eliminate barriers to trade, investment and mobility within Canada".[134] The AIT came into force on July 1, 1995, and negotiations for the agreement brought together ministers and officials from industrial-regional policy, trade policy and federal-provincial relations.[135] It was signed by the federal government and each province/territory at the time – Nunavut currently has observer status. The process of developing the AIT was seen very much as actual "negotiations" rather than just "policy-making", with each jurisdiction bringing its own agenda to the table. [136] Doern and MacDonald assert that provinces such as British Columbia and Saskatchewan saw the main issues as comprising not only a trade agenda, but also one related to federalism and governance, with the main concerns of those provinces centering on the powers of provincial governments.[137] The different provinces and territories each (understandably) took positions reflecting their own relationship to interprovincial trade, with Ontario and Québec for instance "couched in the full knowledge of their strong trade".[138]

The AIT was developed as a means of addressing the trade flow restrictions that have historically been beyond the scope of the *Constitution Act, 1867*. Some authors have pointed out that the AIT emerged out of different circumstances than international trade agreements generally do, given the fact that the signatories were already members of a single nation. Robert Howse of the C.D. Howe Institute describes the circumstances surrounding international trade negotiations as "intergovernmental anarchy", and points out that this was not the situation in the midst of the

[134] Industry Canada, *Agreement on Internal Trade: Summary of the Agreement*, online: Industry Canada <http://www.ic.gc.ca>.
[135] Doern & MacDonald, *Free-Trade Federalism, supra* note 46 at 7.
[136] *Ibid* at 7-8.
[137] *Ibid* at 7.
[138] *Ibid* at 8.

AIT negotiations. He highlights that not only were the Canadian provinces and territories members of a single nation at the time that the AIT was being negotiated, but that the Canadian constitution already implies or requires that there ought to be an economic union within Canada.[139]

A paper published by Industry Canada in 1997, just two years after the introduction of the AIT, disagrees with Howse's position. It asserts that Canada's federalist structure has meant that the AIT negotiations more closely resembled the process of developing multilateral international agreements. That paper points out the high degree of deference that has historically been shown to Canadian provinces in order to not interfere with their respective jurisdictions, stating that the path taken by Canadian federalism "has focused more on independence than co-ordination of spheres of influence".[140]

Clendenning and Clendenning, the authors of the Industry Canada paper, describe the period between 1993 and 1995 leading up to the AIT negotiations as having been preceded by a "constitutional maelstrom".[141] Given the enormous amount of deference shown to the federal division of power in Canada, the authors state that the AIT negotiations were the result of a "constitutional deadlock"[142] and that they proceeded with "an almost inordinate sensitivity shown to provincial independence as opposed to coordination".[143] According to Clendenning and Clendenning, this made for an important proviso which influenced the AIT negotiations. They state that, although the parties involved sought to address all existing interprovincial trade barriers at the same time, "no parties to the agreement would bind themselves to any limitations on legislative power".[144] This reluctance to give up any degree of sovereignty, according to the

[139] Robert Howse, "Securing the Canadian Economic Union: Legal and Constitutional Options for the Federal Government" (1996) *The Canadian Union Paper*, CD Howe Institute, No 81 at 7.
[140] Clendenning & Clendenning, *International Trade Dispute Settlement Mechanisms, supra* note 58 at p 37.
[141] *Ibid* at p 37.
[142] *Ibid* at 36.
[143] *Ibid* at 37.
[144] *Ibid.*

authors, means that the negotiations unfolded much along the lines of what one would expect for an international agreement.[145]

## The structure of the AIT

The AIT is separated into a number of parts, and has been the subject of numerous amendments since it first came into effect. A consolidated version of the agreement is available online,[146] which includes the original AIT text along with its fourteen subsequent Protocols of Amendment. Along with a preamble setting out the goals of the AIT, the agreement is separated into five distinct sections, each one containing a number of more specific chapters. Part I includes general definitions and operating principles; Part II reaffirms the separation of constitutional powers and responsibilities between the federal and provincial governments in Canada; Part III contains general rules of the AIT such as reciprocal non-discrimination and transparency; Part IV contains specific rules related to individual sectors; Part V contains institutional provisions and dispute mechanism procedures; and Part VI lays out additional provisions relating to important issues not present in any of the other parts, such as the agreement's relation to culture, national security and Aboriginal peoples.

The rules contained in the chapters of Part IV were meant to flow from the general rules of Parts I, II and III. The general rules provisions in Part III include rules regarding what are termed "legitimate objectives". Legitimate objectives are dealt with in Article 404, and provide an exception to the other provisions of the AIT agreement. During the AIT negotiations, these provisions were reportedly insisted upon by the provinces so as to allow them to implement policies that comply with the AIT, even though they might be contrary to some or all of the AIT's

[145] Clendenning & Clendenning, *International Trade Dispute Settlement Mechanisms, supra* note 58 at p 37.
[146] AIT, *supra* note 23.

general rules.[147] These policies still have to be developed and implemented in such a way as to not "impair unduly" the access of economic players[148] or be more trade-restrictive than necessary to achieve the desired legitimate objective.[149]

The bulk of the AIT's terms are in the specific rules of Part IV. Throughout the negotiation process, these provisions were handled mainly by sectoral negotiating teams or "tables".[150] Some of the sectors addressed in Part IV are specific in nature, such as those relating to alcoholic beverages and agricultural and food goods, while others are scoped more broadly such as the chapters on procurement, investment and environmental protection. Energy (along with communications, natural resources processing and transportation) has been described as "hybrid in nature", because while it was seen as an industrial sector, it was also acknowledged to be horizontal and economy-wide in nature with a clearly crucial impact on virtually every other economic sector.[151] Unfortunately, as previously mentioned, no agreement was reached with regards to the energy chapter, meaning that Chapter Twelve still remains to be "negotiated in accordance with Article 1810 – Future Negotiations".[152]

Article 1810 sets out the procedures through which the AIT agreement is to be reviewed, and by which it may be expanded to contain new chapters or cover sectors not already included in the agreement. It begins by stating that the parties agree to conclude negotiations on Chapter Twelve no later than the date of entry into force of the AIT agreement.[153] This has of course not been the case, since no energy chapter has yet been implemented. With regards to general rules of

[147] Donald G Lenihan, "When a legitimate objective hits and unnecessary obstacle: Harmonizing regulations and standards in the Agreement on Internal Trade" in *Getting There*, ed Michael J Trebilcock & Daniel Schwanen, (Toronto: C.D. Howe Institute, 1995) [Lenihan, "Harmonizing regulations and standards in the AIT"].
[148] AIT, *supra* note 38, art 404(b).
[149] *Ibid*, art 404(c).
[150] Doern & MacDonald, *Free-Trade Federalism*, *supra* note 46 at 9.
[151] *Ibid* at 9-10.
[152] AIT, *supra* note 38, c 12.
[153] *Ibid*, art 1810.2.

procedure for amending the agreement, Article 1810.4 states that the Committee on Internal Trade ("CIT") is to meet annually to review the scope and coverage of the agreement, and that it may make recommendations for the inclusion of new measures or new chapters. The CIT is a committee established by the parties to the AIT negotiations tasked with: supervising the implementation of the agreement; assisting in dispute resolution; approving the annual operating budget of the Internal Trade Secretariat established through Article 1603; and considering any other matter that may affect the operation of the agreement.[154]

## Progress on the AIT energy chapter

As previously mentioned, the AIT energy chapter was left unfinished when the agreement came into force in July 1995, with the intent that the energy chapter would be completed and implemented at a later date in accordance with Article 1810 of the AIT. It is important to note that Article 1810.3 states that until Chapter Twelve is negotiated, agreed upon and made part of the AIT agreement, no provisions of the AIT may apply to any measures relating to energy goods or services.[155] This means that even portions of the AIT which could have potential positive impacts, such as general non-discrimination rules, will not apply to the energy sector until Chapter Twelve is finally included in the agreement.

Some progress has been made over the years towards finalizing Chapter Twelve, indicating that the provinces are still interested in moving forward with an AIT energy chapter. Yearly progress reports are available on the AIT website[156] managed by the Internal Trade Secretariat, giving status updates on amendments to the AIT as well as developments regarding chapters that are still changing or have yet to be implemented, such as Chapter Twelve.

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[154] AIT, *supra* note 38, art 1600.
[155] *Ibid*, art 3.
[156] All yearly progress reports discussed in this paper are available at *Sectoral Chapter Reports Archive*, online <http://www.ait-aci.ca>.

No specific updates on the energy chapter are available from the first few years after the AIT came into force, although a draft energy chapter was written in 1998. The first Sectoral Chapter Report arrived in 2004/2005. It began by stating that the objective of Chapter Twelve is to harmonize the treatment of energy goods and services. According to the report, in August 2004, provincial and territorial internal trade ministers were directed by their respective premiers to complete negotiations for the AIT energy chapter, with Alberta as the lead jurisdiction. Progress in the 2004/2005 year included the establishment of a working group of federal and provincial/territorial internal trade and energy officials (named the Energy Negotiations Working Group), as well as the development of a preliminary report on energy chapter negotiations and the development of terms of reference for a workplan. The workplan developed through those negotiations[157] included a review of the relevance of the AIT energy chapter, which resulted in general agreement that the goal of the chapter should be to achieve broad market access for energy goods and services. This broadened the scope of the chapter beyond the electricity focus which dominated initial negotiations and which was the extent of the draft energy chapter written back in 1998.[158]

The annual progress report released for the years 2005/2006 gave more updates on the status of Chapter Twelve negotiations. It began by stating the goal of the energy chapter slightly differently than the previous year's report, saying that it would be to provide market access provisions and non-discriminatory treatment for energy goods and services. In the 2005/2006 year, a proposal was developed by trade and energy officials specifically relating to regional development measures around petroleum oil and gas, while at the same time satisfying other

[157] *Internal Trade Workplan*, online: Council of the Federation Secretariat <http://www.canadapremiers.ca> [*Internal Trade Workplan*].
[158] *Agreement on Internal Trade Annual Report 2004/2005,* online: Agreement on Internal Trade <http://www.ait-aci.ca> at 13-14.

provisions of the AIT relating to regional economic development. More "next steps" were established, and a report was prepared on the status of negotiations between officials of the CIT which took place in June 2005.

In January 2006, a progress report was also released discussing the headway that had been made up to that point in meeting the goals of the 2004 workplan. The development of an energy chapter for the AIT was listed in that document as a "longer-term objective". The workplan progress report stated that the negotiations on the completion of an AIT energy chapter had advanced significantly, and that the parties had seemingly overcome the major hurdles which had previously prevented them from implementing an energy chapter under the AIT. The report also highlighted the fact that the parties agreed that the scope of an AIT energy chapter should be on market access provisions for all energy goods and services, rather than just being constrained to the focus on electricity of the initial 1998 draft.

The 2006/2007 iteration of the progress report maintained the same definition of the AIT energy chapter's objective as stated in 2005/2006, saying once again that its goal would be to provide market access provisions and non-discriminatory treatment of energy goods and services. Most notably in that year, more negotiations took place around the relationship between Chapter Twelve and economic development measures, and the province of Alberta drafted an Energy Chapter outline based on the model set by the *Trade, Investment and Labour Mobility Agreement* ("TILMA") between the provinces of Alberta and British Columbia.[159]

No new information was released on the status of Chapter Twelve negotiations in 2007/2008, with the annual update simply restating the same information as the previous year's

[159] On July 1, 2013, a new agreement called the *New West Partnership Agreement* came into effect replacing TILMA, and including Saskatchewan as a party along with Alberta and British Columbia. Information on that agreement can be found at *Canada's New West Partnership,* online: New West Partnership Trade Agreement <www.newwestpartnershiptrade.ca>.

report. The 2008/2009 progress report, however, recognized that concluding an energy chapter had remained an outstanding obligation since the AIT came into effect in 1995 and stated that the development of that chapter had remained a key element of the Council of the Federation ("COF")'s plan to improve internal trade since 2004. At a CIT meeting in 2008, a report was presented to the ministers proposing two options with regards to potential routes for the structure of an AIT energy chapter: the first dealt solely with trade in energy goods, their transportation and transmission; while the second, broader option, would seek to extend the coverage of the AIT to include trade in all energy goods and energy services as well as the production of energy goods. Unfortunately, the CIT was unable to reach a consensus on which option to choose.

In 2009/2010, the COF directed the provinces to conclude the negotiations of the AIT energy chapter at the fall 2009 meeting of the CIT. A complete draft energy chapter was presented to the CIT, and all but one of the provinces were in support of implementing the draft chapter. However, consensus is required to include new chapters in the AIT,[160] so although nearly all parties supported the formal inclusion of the draft chapter into the AIT, the chapter was rejected. Unfortunately, the draft was never released to the public,[161] so it is not currently available for analysis. Although the draft energy chapter was not included in the AIT, it served as the basis for negotiations to develop an energy agreement outside of the AIT pursuant to AIT Article 1800, which states that nothing in the AIT prevents parties from entering into other bilateral or multilateral agreements to enhance trade and mobility.

No further progress on the AIT energy chapter was made in the 2010/2011 year, and the negotiations to develop a separate energy agreement outside of the AIT fell through. The status of

[160] *Electricity in Canada: Smart Investment to Power Future Competitiveness* (Ottawa: The Canadian Chamber of Commerce, 2013) online: Canadian Electricity Association <www.electricity.ca>.
[161] Email from Shawn Robbins, Chief Negotiator, Trade Policy – Domestic, Alberta Economic Development and Trade (8 December 2015).

Chapter Twelve negotiations remained unchanged in 2011/2012, 2012/2013, and 2013/2014. A document was released in September 2015 outlining achievements regarding the AIT to date, on a chapter-by-chapter basis.[162] With regards to energy, the document lists two achievements. The first states that negotiations have continued in order to complete an energy chapter to "enhance market access provisions and non-discriminatory treatment of energy goods and energy services". The second achievement outlined in that document refers to the draft energy chapter written in 2009 that has not yet been implemented. It highlights that the draft chapter reflects the relatively free trade in energy goods and services related to the transmission and transportation of energy goods; that the draft text reflects trade liberalization which has already occurred in the energy sector; and that the parties have agreed to include energy conservation and energy efficiency as legitimate objectives under Article 404.

## Enforcement mechanisms

The AIT's dispute resolution process and enforcement mechanisms are outlined in Chapter Seventeen. Although the chapter's goal is to promote cooperation and dispute resolution in a "conciliatory, cooperative and harmonious manner",[163] some enforcement mechanisms are available in the event that a mutually satisfactory resolution cannot be achieved through cooperation. The dispute resolution process begins with government-to-government consultations involving the disputing parties and the Internal Trade Secretariat. Where the matter remains unresolved, a panel is established to address the dispute. The panel must prepare a report containing its findings on whether the measure complained of is inconsistent with the AIT, whether the measure has impaired or would impair internal trade, recommendations to assist in resolving

[162] Internal Trade Secretariat, *Achievements*, online: Agreement on Internal Trade <http://www.ait.aci.ca>.
[163] AIT, *supra* note 23, art 1700(1).

the dispute, and a determination with regards to operational costs.[164] Wherever possible, disputes are to be resolved by removing the offending measure,[165] although panels may also impose monetary penalties. If the matter is still not resolved one year after the panel's issuance of its report, retaliatory measures or a suspension of benefits is possible under Article 1709.

The enforcement procedure outlined in the AIT is fairly robust, and mirrors similar dispute resolution procedures in international agreements such as the GATT. However, Article 1701 outlines a number of exceptions to Chapter Seventeen. Examples of measures to which Chapter Seventeen's enforcement mechanisms don't apply include Annex 405.2 (Regulatory Measures and Regulatory Regimes). Annex 405.2 states that parties shall seek to reconcile their standards and standard-related measures, and that they should address differences in regulatory regimes or measures which create obstacles to internal trade. Carving out Annex 405.2 as an exception to the AIT's enforcement regime is a way to allow provinces to retain some degree of autonomy in terms of setting standards and creating regulatory regimes. However, since evidence suggests that the internal trade barriers in the electricity sector are at least partially the result of disjointed regulatory regimes, this also means that the enforcement mechanisms of the AIT will have a limited bearing on some aspects of energy sector trade barriers.

## Outcomes of the AIT

The actual level of success achieved by the AIT in eliminating interprovincial barriers to free trade has been the subject of some dispute. Clendenning and Clendenning contend that the commitment to freer trade was made only in principle.[166] However, there is also evidence that at least some portions of the AIT have resulted in greater mobility among goods and services between

[164] AIT, *supra* note 23, art 1706(3).
[165] *Ibid*, art 1707(2).
[166] Clendenning & Clendenning, *International Trade Dispute Settlement Mechanisms*, *supra* note 58 at 37.

provinces. With an important barrier to trade in the energy sector seeming to be a lack of coordination among regulators,[167] it is worthwhile to examine the AIT's level of success at reducing regulatory barriers under other chapters which have already been implemented. Donald Lenihan, senior associate at the Public Policy Forum in Ottawa, has argued that the AIT chapter on labour mobility is one of the more successful chapters in the agreement in terms of harmonizing regulations and standards.[168] In his report on the economic impacts of the AIT, Beaulieu assesses the actual impacts of the AIT's labour mobility chapter on the harmonization of regulations and standards, pointing out some of the chapter's successes as well as some of its shortcomings. He notes that the AIT requires parties to mutually recognize occupational qualifications, for instance, but that the agreement leaves differences in occupational standards to be reconciled between parties. He also points out that the chapter on labour mobility contains a fundamental shortcoming in the form of a wide range of "legitimate objectives" providing for multiple exceptions. Beaulieu points out that these legitimate objectives include labour market development and the provision of adequate social and health services to all geographic regions of a given jurisdiction. He suggests that the broad definitions given to these two additional legitimate objectives undermine the intention of the chapter.[169]

There are signs, however, that the evolution of the AIT is moving in the right direction for the free movement of goods and services in Canada. In 2009, a number of amendments were introduced to the AIT affecting the labour mobility chapter. The amendments focused heavily on the recognition of worker certifications between provinces, and on other measures to reduce

[167] Beaulieu, *Economic Impact of the AIT*, *supra* note 52 at 15.
[168] Lenihan, "Harmonizing regulations and standards in the AIT", *supra* note 147 at 105.
[169] Beaulieu, *Economic Impact of the AIT*, *supra* note 52 at 16.

barriers to labour mobility.[170] The amendments sought to address these issues by requiring the elimination of local residency requirements; mandating certification of workers in Canadian provinces and territories previously certified in another Canadian jurisdiction; mandating that certification processes for workers from other jurisdictions be transparent, objective and impartial; and requiring regulators to provide publicly accessible certification information.[171] More importantly, "labour market development" has been removed as a legitimate objective in the most recent consolidated version of the AIT, demonstrating that steps are being taken to strike a balance between provinces' own internal autonomy and the broader goal of encouraging interprovincial free trade.

# 7. The AIT energy chapter in a broader context

Recent developments have shown that there may be growing political will for Canadian Provinces and territories to engage in greater cooperation in the electricity sector. Over the past few years, attempts have been made to promote increased interprovincial cooperation, perhaps making it the right time for an energy chapter to finally be added to the AIT. By transforming the current political will into concrete measures to promote cooperation, this trend could be encouraged to continue into the future. With the current push towards developing a more sustainable energy sector in Canada, and with Ontario undergoing a major restructuring of its electricity sector in terms of infrastructure investments, an AIT energy chapter with the capacity to facilitate interprovincial electricity trade could help to pave the way for Québec and Ontario to move forwards with current plans to swap electricity and cement their trade partnership. The

[170] *Agreement on Internal Trade New Amended Chapter 7 on Labour Mobility: Backgrounder*, online: Internal Trade Secretariat <http://www.ait-aci.ca>.
[171] *Labour Mobility Act: Questions and Answers,* online: Government of British Columbia <www.jtst.gov.bc.ca> at 3.

following section outlines some past and present examples of national and interprovincial cooperation in the electricity sector, and discusses how an AIT energy chapter could function alongside these initiatives.

## 2007: A Shared Vision for Energy in Canada

In 2007, the COF released a report titled *A Shared Vision for Energy in Canada*,[172] outlining its plan for an interprovincial energy strategy. The main focus of this plan was to build on the previous initiatives developed by individual provinces through "a seven point action plan that strikes a balance between energy supply, environmental and social responsibility, and continued economic growth and prosperity".[173] Two key components of the plan were to place an emphasis on GHG emission reductions, and to contribute to continued economic growth and prosperity.[174] As briefly outlined above and addressed in more detail in *Advancing the Dialogue*, these are also the types of contributions that could be made by increased interprovincial electricity trade between the provinces of Québec and Ontario. Hydropower is highlighted in *A Shared Vision* as one of the clean technologies that could facilitate the achievement of the plan's goals, with the report pointing out that hydroelectricity made up 58.5 per cent of Canada's total electricity produced in 2004[175] (it has since increased to 63 per cent of Canada's total electricity production).[176] The report advocates for increased energy transmission between Canadian provinces as a way to achieve a number of benefits, including: promoting energy supply and reliability; enabling the development of new renewable and clean energy resources; reducing regional supply/demand disparities; and benefitting provinces and territories that produce

[172] *A Shared Vision for Energy in Canada* (Ottawa: The Council of the Federation, 2007) [*A Shared Vision*].
[173] *Ibid* at 2.
[174] *Ibid* at 3.
[175] *Ibid* at 5;
[176] The Council of the Federation, *Canadian Energy Strategy* (Ottawa: Council of the Federation Secretariat, 2015) at 5 [*Canadian Energy Strategy*].

electricity resources as well as those that consume them. The COF also pointed out some obstacles that would have to be overcome in order to achieve the goals set out in its report, emphasizing the fact that the efficiency of the energy sector has been reduced by a "complex web" of regulatory processes.[177] Fully implementing Chapter Twelve of the AIT could help to reduce some of the regulatory barriers to interprovincial electricity trade in Canada by increasing cooperation among provinces and ensuring that provincial and federal regulators work together in the interest of a well-coordinated energy sector.

The AIT energy chapter could also help address some of the barriers set out in *A Shared Vision* through other portions of the AIT. As previously described, Article 1810.3 prohibits any part of the AIT from applying to energy goods or services until Chapter Twelve is negotiated and implemented. The COF's report states that another barrier to energy projects in Canada is in relation to insufficient labour mobility.[178] By making it so that Chapter Seven of the AIT on Labour Mobility, for instance, also applies to the energy sector, a finalized Chapter Twelve could help address this and similar concerns raised in *A Shared Vision.*

## 2009: Ontario and Québec Trade and Cooperation Agreement

There have been some recent moves by the provinces of Ontario and Québec towards a more integrated trade relationship. In 2009, the two provinces entered into the bilateral Ontario and Québec Trade and Cooperation Agreement[179] ("OQTCA") outside of the AIT, allowed under AIT Article 1800 (Trade Enhancement Arrangements). Along with the goals of addressing economic challenges and eliminating interprovincial trade barriers, the OQTCA aims to "enhance

[177] *A Shared Vision, supra* note 172 at 7.
[178] *Ibid.*
[179] *Trade and Cooperation Agreement Between Québec and Ontario* (September 2009) online: Internal Trade Secretariat <www.ait-aci.ca> [OQTCA].

regulatory cooperation" and to "promote sustainable development".[180] The OQTCA covers much of the same subject matter as the AIT, but the inclusion of issues not currently covered in the AIT sets it apart. The OQTCA contains an energy chapter that aims to increase interprovincial cooperation in the energy sector, although it could still go further with regards to specifics and does not take into account recent developments.

Chapter Four of the OQTCA deals with Energy Cooperation between Ontario and Québec. Specifically, the chapter emphasizes cooperation regarding energy policies.[181] It has a limited focus on sustainability, stating that the parties shall promote "inter-jurisdictional cooperation in energy policies and a modern, reliable, and environmentally responsible series of energy transmission and transportation networks".[182] The chapter's other goals include improving "the economic efficiency of the energy sector" and increasing "the reliability of energy supply and infrastructure, within Ontario and Québec".[183] Specific responsibilities are laid out for energy ministers in the two provinces. These include providing a forum for discussions on joint energy solutions and overseeing the program of energy cooperation activities between the parties.[184]

The OQTCA also establishes an Energy Cooperation Committee to be co-chaired by senior officials from both Ontario and Québec, and which is responsible for reporting to the provinces' respective ministers. The committee is tasked with identifying options for additional cooperation opportunities. The committee's mandate is to:

a) assist and support Ministers in the fulfillment of their obligations under the Chapter;

b) oversee the day-to-day implementation and management of the Chapter;

[180] OQTCA, *supra* note 179, art 1.1.
[181] *Ibid*, art 4.2.
[182] *Ibid*, art 4.3(2).
[183] *Ibid*, art 4.3(1).
[184] *Ibid*, art 4.7(3).

c) identify opportunities and develop options for consideration by Ministers for additional cooperative activities; and

d) report annually to Ministers.[185]

The OQTCA does not, however, include any specific mention of developing either electricity swap or purchase agreements. Although the OQTCA does include a chapter on "Regulatory Cooperation", it does not specifically address electricity regulators within Chapter Four. Furthermore, the fact that the OQTCA was developed in 2009 means that much has happened in the Québec-Ontario energy sector in the intervening years. An AIT energy chapter could pick up where the OQTCA left off by devoting itself specifically to facilitating regulatory cooperation and regional energy planning among various provinces, which could help Ontario and Québec to further develop their relationship as trading partners. The OQTCA's energy chapter focuses largely on directing responsible authorities to identify opportunities for cooperation. Now that these opportunities have been identified studies and reports such as *Advancing the Dialogue*, the AIT energy chapter could focus specifically on making those opportunities a reality.

There is minimal literature analyzing the achievements of the OQTCA and almost none on the Energy Cooperation Committee, making it difficult to evaluate the level of success of the OQTCA's energy chapter. It is possible, however, that an AIT energy chapter could make more headway towards achieving regional or national energy sector cooperation through the involvement of the other Canadian provinces and Territories, as well as the federal government. It could also create a body similar to the Energy Cooperation Committee with the specific goal of encouraging electricity trade between provinces through regional-scale planning.

[185] OQTCA, *supra* note 179, art 4.8.

## 2014-2015: Memoranda of Understanding

Over the past two years, Ontario and Québec have signed a number of MOUs indicating their willingness to cooperate on the issues of climate change strategy, interprovincial trade and energy policy.

Three of these MOUs were signed in November 2014. The first expressed the two provinces' intention to "develop a vision and long-term objectives in the fight against climate change".[186] It contained specific references to collaboration on market-based mechanisms by linking with California as part of the WCI, in order to facilitate the transition to a low carbon economy while creating jobs and promoting economic wealth.

The second MOU signed in November 2014 was aimed at revitalizing the trade relationship between Ontario and Québec through a renewal of the OQTCA. It made a few changes to the existing agreement text from 2009, mostly in the area of government procurement. However, it also indicated the provinces' intentions to collaborate more closely in a number of other areas, with the energy sector among them. The MOU stated that Ontario and Québec would look for ways to enhance and expand existing cooperation provisions through an update to the Energy Chapter of the agreement.[187] Although no update to that chapter has been implemented to date, this is another indication that the political will to move forwards with greater energy cooperation between the two provinces is growing.

The third MOU released in November 2014 was on the topic of a seasonal electricity exchange between Ontario and Québec. As already discussed, Ontario currently experiences its

[186] Office of the Premier, Backgrounder, "Memorandum Of Understanding Between The Government Of Ontario And Le Gouvernement Du Québec Concerning Concerted Climate Change Action" (24 November 2014) online: Newsroom <http://news.ontario.ca>.
[187] Office of the Premier, Backgrounder, "Memorandum Of Understanding Between The Government Of Ontario And Le Gouvernement du Québec Regarding The Revitalization Of The Ontario-Québec Trade And Cooperation Agreement" (24 November 2014) online: Newsroom <http://news.ontario.ca>.

peak electricity demand in the summer, while Québec is a winter-peaking jurisdiction.[188] Each province must have enough electricity to meet its needs at its times of highest demand. Rather than each province building that capacity independently from one another, this MOU articulates the provinces' intention to establish a capacity swap agreement to exchange 500 megawatts of electricity from Ontario to Québec in the winter, and vice versa in the summer.[189] This is one of the potential electricity collaboration scenarios discussed in *Advancing the Dialogue*, and again demonstrates that there is a willingness for the two provinces to collaborate in the energy sector.

An MOU released in October 2015 expanded on the idea of capacity exchanges between the provinces of Ontario and Québec, and suggested that increased collaboration in the energy sector could be beneficial for both provinces. Building on the provinces' acknowledgements that they must work together to address the threat of climate change, that Québec enjoys surplus clean hydroelectricity and that Ontario will require temporary sources of electricity while its nuclear plants undergo refurbishment, the provinces agreed to maintain an "open and on-going dialogue on opportunities for bilateral collaboration".[190] The agreement serves as a recognition by both Ontario and Québec that the two provinces could further benefit from electricity trade in more than a seasonal swap capacity, and acknowledges that an agreement which secures electricity for Ontario from Québec while Ontario's nuclear refurbishments are underway could be beneficial to both parties. The agreement has been called a "significant step in their partnership" that "will

[188] NEB, *Trends and Issues, supra* note 33 at 22.
[189] Office of the Premier, Backgrounder, "Joint Memorandum: Seasonal Exchange Of Electricity Capacity Between Ontario And Québec" (24 November 2014) online: Newsroom <http://news.ontario.ca>.
[190] Office of the Premier, Backgrounder, "Memorandum of Understanding Between the Government of Ontario and the Government of Québec Regarding Continued Energy Collaboration and Potential Opportunities for Ontario-Quebec Electricity Trade Agreement" (5 October 2015) online: Newsroom <http://news.ontario.ca> [Energy Collaboration MOU].

explore the potential for increased trade in electricity to provide savings to Ontario ratepayers and help meet Ontario's energy needs through Québec's clean and renewable electricity supply".[191]

Also pursuant to this MOU, the Ontario and Québec ministers and deputy ministers responsible for energy are to meet on a quarterly basis to discuss and explore opportunities for greater electricity trade.[192] Similarly, the ministers are also instructed to mandate their respective energy agencies, the IESO and Hydro Québec to also meet on a quarterly basis to share best practices and lessons learned, and to identify emerging opportunities regarding electricity trade.[193] Through this MOU, the governments of Québec and Ontario acknowledged that there remains untapped potential for mutual benefits through greater interprovincial collaboration in the energy sector. The meetings mandated between energy officials and regulatory agencies are also a step in the right direction, but don't have as much force in an MOU as they would have in a more formalized agreement. A similar requirement for regular meetings could be another useful addition to the AIT energy chapter.

## 2015: A Canadian Energy Strategy

In July 2012, the COF established a working group led by the premiers of Alberta, Manitoba, and Newfoundland and Labrador. This working group was instructed to work with provincial and territorial energy ministers to build on the 2007 *A Shared Vision* report to assess new challenges facing the energy sector and ensure that Canada has a "strategic, forward thinking approach for sustainable energy development that recognizes regional strengths and priorities".[194] Provincial and territorial premiers agreed that the renewed COF energy strategy should include

[191] Office of the Premier, News Release, "Québec-Ontario Partnership Yields Results" (11 September 2015) online: Newsroom <http://news.ontario.ca>.
[192] Energy Collaboration MOU, *supra* note 190.
[193] *Ibid*.
[194] *Premiers Guide Development of Canada's Energy Resources*, online: Council of the Federation Secretariat <http://www.canadaspremiers.ca> [*Premiers Guide*].

maintaining effective and efficient regulatory systems, and affirming intergovernmental cooperation.[195] This renewed process resulted in the publication of a *Canadian Energy Strategy*[196] in July 2015. The national energy strategy developed by the provinces focuses on three main goals: sustainability and conservation; technology and innovation; and delivering energy to people.[197] The AIT energy chapter has the potential to work alongside the third goal in particular. The areas of focus ascribed to the goal of "delivering energy to people" include developing an efficient domestic and import/export electricity transmission network; improving the regulatory process; and promoting the participation of provinces and territories in international negotiations. All of these areas of focus speak to the fact that there is a recognized need for greater cooperation between provinces, territories and the federal government. Along with the objective of identifying opportunities to develop, transport and transmit energy, however, the energy strategy adds the caveat of doing so in accordance with provincial-territorial jurisdiction.[198] Although it is of course necessary for provinces and territories' jurisdictions to be respected, the express inclusion of this caveat seems to demonstrate the same type of provincialist sentiment that has prevented greater energy integration in the past. Formalizing the various provincial and territorial actors' intention to work cooperatively through the development of an AIT energy chapter could be an important step towards overcoming this sentiment in order to facilitate future cooperation.

## 2017: Ontario's entry into the Western Climate Initiative

The *Canadian Energy Strategy* cites market approaches as a favourable way to transition to a low-carbon economy. One market initiative which has been picking up steam in recent years is the Western Climate Initiative ("WCI"). The WCI is an initiative to link the cap-and-trade

[195] *Premiers Guide*, *supra* note 194.
[196] *Canadian Energy Strategy*, *supra* note 176.
[197] *Ibid* at 8.
[198] *Ibid* at 11.

systems of participating Canadian provinces and American states to set an interjurisdictional price on carbon with the goal of reducing regional GHG emissions to 15 per cent below 2005 levels by 2020. It involves a regional "cap" on greenhouse gas emissions and uses tradeable permits to provide an incentive to switch to low-carbon energy sources.[199]

Québec is already an active member of the WCI alongside California. Ontario will join the carbon trading regime[200] once its own cap-and-trade system is introduced in 2017, with Manitoba also planning to become an active member.[201] While Ontario's entry into the WCI's carbon market will reduce the risk of southward capital outflow, [202] increased electricity imports into Ontario from Québec could also help to harmonize electricity prices between the two provinces. Given the level of market integration that will occur between Québec and Ontario with the latter's entrance into the WCI's carbon market, a higher level of cooperation in the electricity sector between the two provinces in anticipation of 2017 also makes sense.

Ontario recently released the proposed *Climate Change Mitigation and Low Carbon Economy Act* ("*Climate Change Act*"), which provides details on how the province's cap-and-trade system will function. One key step that the *Climate Change Act* will take is to establish a Green Investment Fund. This fund will allocate the money collected through Ontario's cap-and-trade system to financing projects that fight climate change.[203] Although more details on the program are yet to be released, it is not beyond the realm of possibility that part of the funds from this program could be directed towards developing Ontario's clean energy infrastructure, which could include investments in transmission capacity to import hydro power from Québec. With new

[199] *Program Design,* online: Western Climate Initiative <http://www.westernclimateinitiative.org>.
[200] Cap and Trade System News Release, *supra* note 14.
[201] The Canadian Press, "Western Climate Initiative Will See Manitoba, Ontario, Quebec Link Up Cap-And-Trade Systems" *The Huffington Post* (7 December 2015) online: TheHuffingtonPost.com <http://www.huffingtonpost.ca>.
[202] *Advancing the Dialogue, supra* note 25 at 35.
[203] Ministry of the Environment and Climate Change, News Release, "Ontario Introduces New Climate Change Legislation" (24 February 2016) online: Newsroom <http://news.ontario.ca>.

details of the Green Investment Fund and Ontario's cap-and-trade system yet to be released, more work could be done in this area to secure funding for new electricity transmission infrastructure.

# 8. Potential energy chapter content

The previous sections have summarized the types of trade barriers identified in Canada's energy sector and the ways in which the AIT energy chapter would relate to previous electricity cooperation initiatives. The current section seeks to identify key components that the AIT energy chapter should include.

Regardless of the content of the AIT energy chapter, drafting it would have the positive result of making the rest of the AIT apply to the electricity sector. General rules provisions such as Article 405 on the harmonization of regulatory measures, and provisions from chapters on topics such as labour mobility, could have positive impacts on interprovincial electricity trade. These will become applicable to the electricity sector once Chapter Twelve is finalized.

In terms of specific provisions, Chapter Twelve could use the already-implemented AIT and OQTCA chapters as models. AIT Chapter Eleven on Natural Resources Processing would be a good starting point, given that natural resources are under the same constitutional provincial authority as electricity[204] – meaning that the same constitutional division of powers applies to both sectors. Following this model would ensure that the jurisdiction of provinces and territories over their own resources is respected in accordance with the *Canadian Energy Strategy*.[205] The OQTCA energy chapter could also serve as a good example, given that it already deals with interprovincial electricity trade between Ontario and Québec.

[204] They are both under provincial jurisdiction pursuant to section 92A(1) of the *Constitution Act, 1867*, *supra* note 55.
[205] *Canadian Energy Strategy*, *supra* note 176 at 11.

In order to ensure that the AIT strives to encourage a sustainable electricity sector, the energy chapter should include some reference to environmental considerations. Although the AIT is based on a fairly traditional conception of free trade, the agreement does include limited precedent for taking environmental considerations into account. Chapter Fifteen on Environmental Protection includes a provision mandating that parties "in dealing with trade matters, take into account the need to restore, maintain and enhance the environment".[206] This provision is limited in scope to environmental measures that may affect the interprovincial mobility of people or interprovincial trade in goods,[207] but it could provide an example for a sustainability provision in the energy chapter. The OQTCA energy chapter mandates that sustainability considerations be taken into account through its encouragement of "environmentally responsible" transmission networks, and could provide another good example for the new AIT chapter. [208] This type of provision could help to encourage positive environmental outcomes such as replacing nuclear and hydrocarbon-generated electricity with hydro and other renewables.

In relation to political barriers, drafting and including an energy chapter in the AIT is a step in the right direction. Each jurisdiction within Canada has developed its own electricity system independently of one other, which has led to a variety of different generation portfolios.[209] Each province and territory has its own energy sources and uses, making for a number of unique energy needs and priorities.[210] The distinctly provincial nature of the electricity system in Canada has meant that there exists a sense of unease with regards to "out-of-province interference",[211] and that

[206] AIT, *supra* note 38, art 1505(1).
[207] *Ibid*, art 1502.
[208] OQTCA, *supra* note 179, art 4.3(2).
[209] Pineau, "Fragmented Markets", *supra* note 111 at 367.
[210] *Canadian Energy Strategy: Progress Report to the Council of the Federation* (Ottawa: Council of the Federation Secretariat, 2013).
[211] Pineau, "Fragmented Markets", *supra* note 111 at 386.

pursuing interprovincial collaboration has the potential to lead to a political backlash.[212] However, trends in recent years have demonstrated that the concept of interprovincial electricity collaboration is beginning to make its way onto the political agenda, and is finding a place at the centre of many policy discussions. The number of MOUs relating to collaboration on the issues of climate change, interprovincial trade and electricity generation demonstrates that Ontario and Québec are realizing that increased interprovincial cooperation in the energy sector could bring benefits to both parties. The recent creation of the *Canadian Energy Strategy* indicates that this issue is also on the radar of the other Canadian provinces. MOUs and policy documents are non-binding, however, and more concrete measures are needed to solidify interprovincial collaboration. The AIT could serve as a way to codify processes that can help to facilitate cooperation and coordination among the various federal and provincial regulators.

In order to address regulatory trade barriers, the AIT energy chapter could include provisions on the reconciliation of measures which have an impact on interprovincial electricity trade. These could be based on Article 1105 of the AIT's Chapter Eleven on Natural Resources Processing, which mandates that every effort be made to reconcile "measures that have an impact on trade in the processing of natural resources". In the same vein, the AIT's energy chapter could also include objectives similar to those in the OQTCA to: improve knowledge-sharing; explore ways to enhance interconnectedness; build on the synergies between the electricity systems and work towards more interconnected electricity systems by improving planning coordination, co-operation and encouragement of electricity interconnectedness; and exploring opportunities for the development and harmonization of broader regional energy systems.[213]

[212] Pineau, "Fragmented Markets", *supra* note 111 at 386.
[213] OQTCA, *supra* note 179, art 4.4.

While the creation of general provisions would be a good step towards increasing interprovincial collaboration, a significant contribution could be made by following the example of the AIT chapter on Natural Resources Processing and establishing a working group similar to the one created under AIT Article 1104. The purpose of the Working Group on Processing of Natural Resources is to: assess whether the chapter has met its objectives; identify and resolve outstanding implementation issues respecting the chapter; revise the chapter to accommodate changing principles under the AIT agreement; and review the opportunities for progress on matters related to the processing of natural resources that are not covered in, or are excluded from, the chapter. A Working Group on Energy could fulfill a similar function in the electricity sector.

It could also be beneficial to make the new Working Group on Energy's mandate more comprehensive by following the example of Chapter Four of the OQTCA on Energy Cooperation. The OQTCA's Energy Cooperation Committee is assigned more responsibilities than the AIT's Working Group on Processing of Natural Resources due to the number of Article 4.4's Energy Cooperation Activities. It is specifically instructed to enhance interconnectedness for clean and renewable energy exchanges, and to build on the synergies between the electricity systems of Ontario and Québec to work towards more interconnected electricity systems.[214] The Working Group on Energy could similarly be instructed to promote the interconnectivity of the Canadian electrical system and to coordinate cross-jurisdictional energy planning.

Although the AIT's Working Group on Energy could take up some of the same responsibilities as the OQTCA's Energy Cooperation Committee in terms of identifying opportunities for greater collaboration in the electricity sector, its focus should be on addressing the opportunities that have already been identified. With the benefits of various trade scenarios

[214] OQTCA, *supra* note 179 art, 4.4.

having already been analyzed in the *Advancing the Dialogue* report and the recent MOUs between Ontario and Québec, it is no longer enough to identify opportunities for collaboration. Action must be taken to seize the opportunities that have already been identified.

The AIT's Working Group on Energy should also follow the OQTCA's Energy Cooperation Committee's example of holding regular meetings. The AIT's Working Group on Processing of Natural Resources is only instructed to meet every two years under Article 1104.2 of the AIT. Given the speed at which developments in the electricity sector can progress, this timeline would likely be inadequate for a Working Group on Energy. The OQTCA mandates that the Energy Cooperation Committee report to the provincial Energy Ministers annually, who are in turn required to meet at the request of a Party.[215] The Working Group on Energy would ideally meet at least that frequently. A more appropriate avenue might be to follow the requirement for quarterly meetings mandated between ministers and deputy ministers responsible for energy under Ontario and Québec's 2015 MOU on Energy Collaboration.[216]

The main advantage in creating an energy chapter for the AIT rather than simply relying on the OQTCA is the fact that the latter agreement only applies to the provinces of Ontario and Québec. Although the goal of the present paper is to analyze the AIT's potential to help facilitate electricity trade between those two provinces, the new energy chapter could work to achieve greater electricity collaboration across Canada. Incorporating other provinces into the agreement could be useful for energy planning on a larger scale and could help to secure the involvement of federal regulators. Agencies such as the NEB do play a limited role in interprovincial electricity transmission, as previously described. They could fulfill a coordination function among different provincial regulators, helping to develop electricity policies that are in the best interests of Canada

[215] OQTCA, *supra* note 179, art 4.7.1.
[216] Energy Collaboration MOU, *supra* note 190.

as a whole. Having the federal government as a partner in facilitating interprovincial electricity trade could also help to obtain federal funding. The recent federal budget allocates 2.5 million dollars to "advancing regional electricity cooperation" by facilitating regional dialogues.[217] The willingness of the federal government to fund this type of cooperation could take some of the financial burden off of the provinces.

Including an energy chapter in the AIT could also provide a basis for future collaboration among the various jurisdictions. The *Advancing the Dialogue* report points out that a policy framework for free trade in electricity trade does not currently exist, and "must be created anew every time negotiations are opened".[218] Perhaps the most important function that the AIT energy chapter could fulfill is to get the various electricity sector actors on the same page. As previously described, the political and regulatory barriers in the electricity sector can be traced back to the disjointed nature of electricity regulation in Canada. One issue that was raised in *Advancing the Dialogue* is the lack of a coordinated plan for Canada's energy future. It was stated that the most important barrier to collaboration in the energy sector could be the "lack of vision for what the future system built around provincial electricity and climate change collaboration could or should look like".[219] Finally drafting a document which brings all provincial, territorial and federal actors to the table could cement a unified vision for Canada's energy sector.

# 9. Conclusion

The IESO's report on interprovincial interties demonstrates that increased electricity trade between Ontario and Québec is technically feasible, and that it could cost much less than

[217] Canada, House of Commons, *Growing the Middle Class* (March 2016) at 154 (Tabled by: William Francis Morneau).
[218] *Advancing the Dialogue, supra* note 25 at 47.
[219] *Ibid* at 48.

proceeding with Ontario's planned nuclear refurbishments. The main barriers to interprovincial electricity collaboration therefore seem to be mostly regulatory, political, and cultural. The disjointed nature of Canada's electricity sector is the result of the country's federal constitution and the provinces' historic focus on electricity self-sufficiency, along with their over-reliance on the United States as an export market. Canada's strong history of provincial autonomy in the electricity sector, coupled with the disjointed nature of the provincial and federal regulatory schemes, has resulted in more electricity being sent southwards to the United States than between Canadian provinces and territories. The key to securing the benefits of increased electricity trade outlined in the *Advancing the Dialogue* report likely lies in addressing the current political and cultural barriers to internal trade.

Pineau suggests that an AIT energy chapter could result in electricity market integration in Canada.[220] In the 2006 progress report on its Workplan on Internal Trade, the COF acknowledged that the addition of an energy chapter to the AIT "would close a significant gap, and would represent a major step forward in expanding coverage of the Agreement". [221] The AIT energy chapter could draw inspiration from existing documents such as the OQTCA and the AIT's chapter on Natural Resources Processing. It could follow their examples by establishing a Working Group on Energy, but could mandate that the working group meet more regularly and that it focus specifically on interprovincial market integration and supra-regional electricity planning. Completing the AIT's Chapter Twelve on Energy would make other parts of the agreement applicable to the energy sector. It could cement the growing political will associated with interprovincial cooperation, and could serve as a basis for future negotiations. Perhaps most importantly, it could ensure that all provinces, territories and the federal government are on the

[220] Pineau, "Fragmented Markets", *supra* note 111 at 387.
[221] *Internal Trade Workplan*, *supra* note 157 at 2.

same page. By promoting a unified vision for Canada's electricity sector, the AIT energy chapter would fit in with recent initiatives for interprovincial cooperation and could facilitate the development of a national energy strategy.

Recent signs demonstrate that the provincial, territorial and federal governments are willing to work together to fight climate change and develop a more integrated electricity sector. These include the new Prime Minister's invitation to territorial and provincial premiers to join him at the Paris climate talks, the commitment of Québec, Ontario and Manitoba to participate in the WCI, and the recent allocation of resources to advancing regional electricity cooperation in the federal budget. Implementing an AIT energy chapter that applies to all provinces and territories, now that the political will seems to exist for increased collaboration, could help to establish a framework for negotiations moving forward.

The main question that remains, however, is whether an AIT energy chapter could receive the consensus of all the necessary parties. Given that the original agreement was reached in 1995 and that no energy chapter has been included to date, it seems that hoping for consensus to be reached through AIT negotiations could be an unrealistic expectation. Although advancements have been made on Chapter Twelve as described in the annual progress reports, the similarity of AIT negotiations to the development of international treaties demonstrates the difficulties that would have to be overcome. For this reason, it is possible that the best option for Ontario and Québec is to proceed through bilateral negotiations.

Recent agreements such as the 2009 OQTCA and the 2014 and 2015 MOUs between Ontario and Québec have demonstrated a growing recognition that increased electricity collaboration could have benefits for both provinces, even though Ontario's Energy Minister has been hesitant to accept hydroelectricity imports as a replacement for Ontario's nuclear

refurbishments. The relationship between the two provinces has progressed at a much faster pace than the development of the AIT, which speaks to the fact that achieving consensus among two trading partners is much easier than among thirteen. Although the AIT could offer a host of unique benefits, renewing the OQTCA could be the best option for facilitating electricity collaboration between Québec and Ontario. A willingness already exists to update the agreement, as demonstrated by the MOU on that topic. The OQTCA energy chapter could be amended to include a greater focus on sustainability and on electricity trade between the two provinces. The apparent willingness for the two provinces to work collaboratively in the electricity sector could perhaps most effectively be cemented through this bilateral agreement than by waiting for the difficult-to-achieve benefits that would come from updating the AIT.

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